90-1194

Supreme Court, U.S.
FILED
JAN 23 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Court Of Maine

PETITION FOR A WRIT OF CERTIORARI

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DATED: January, 1991

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QUESTION PRESENTED

Is it constitutionally permissible for a state where a nuclear power plant is located to establish the decommissioning funding requirements for that nuclear power plant when the federal government exercises ratemaking jurisdiction?

LIST OF PARTIES

The parties to the proceeding in the Maine Supreme Judicial Court were petitioner Maine Public Utilities Commission, the Industrial Energy Consumers Group and respondent Maine Yankee Atomic Power Company. Amicus Curiae briefs were filed by the Edison Electric Institute and Consumer-Owned Purchasers (of Maine Yankee power). The Maine Public Advocate participated in the administrative proceeding before the Maine Public Utilities Commission, but did not participate in the appeal to the Supreme Judicial Court of Maine.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

The Maine Public Utilities Commission petitions for certiorari to review the decision and order of the Supreme Judicial Court of Maine in this case.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court is reported at 581 A.2d 799 and appears at Pet. App. A.[1] The decision of the Maine Public Utilities Commission is unreported but appears as Pet. App. B.

JURISDICTION

The case before the Supreme Judicial Court of Maine was decided and issued on October 25, 1990. This Court has jurisdiction to review the decision of the Maine Supreme Judicial Court under 28 USC § 1257(a)(1988).

STATUTORY PROVISION

The Nuclear Decommissioning Financing Act of Maine, 35-A M.R.S.A. §§ 4351-59, appears as Pet. App. C.

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[1] References to Pet. App. are to the appendix to this petition.

STATEMENT OF THE CASE

Maine law, the Nuclear Decommissioning Financing Act, 35-A M.R.S.A. §§ 4351-4359 (1988) (hereinafter referred to as "NDFA") requires that the Maine Public Utilities Commission (MPUC) establish a decommissioning financing plan for the Maine Yankee Atomic Power Plant that includes payments into an external fund to reflect the MPUC's determination of the estimated costs of decommissioning. The Maine Supreme Judicial Court struck down the NDFA as preempted by the ratemaking authority of the Federal Energy Regulatory Commission (FERC) and a pervasive federal scheme regulating decommissioning of nuclear power plants.

A. Decommissioning Required.

When a nuclear reactor reaches the end of its operating license, the United States Nuclear Regulatory Commission (NRC) requires the reactor to be "decommissioned." 53 Fed. Reg. 24018, 24019 (June 27, 1988). According to the NRC, decommissioning means "to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits the release of the property to unrestricted use and termination of license." 10 C.F.R. § 50.2 (1990). Portions of the nuclear reactor vessel itself, the internal structure of the vessel and the shielding that surrounds the vessel are rendered radioactive by exposure to the fission process. The contaminated parts must be dismantled, transported from the site and buried at a federally licensed disposal facility. Transportation and burial costs for low-level

radioactive waste have sky-rocketed during the past decade. (R. 1389)

The NDFA requires any licensee operating a nuclear power plant within Maine to file a proposed decommissioning financing plan with the Public Utilities Commission and for the Commission to review that plan and ultimately approve a decommissioning plan. 35-A M.R.S.A. §§ 4351-4359 (1988). The primary purpose of the Act is to ensure that when it is time to decommission a nuclear power plant in Maine, adequate money is available to do the job. The Act requires the Commission to establish the cost of decommissioning and to establish a schedule of monthly payments into the decommissioning trust fund as necessary and convenient to meet the decommissioning cost at the time of closing. 35-A M.R.S.A. § 4353(4). The Commission must review the estimated cost of decommissioning at least every five years and based upon that review, revise the schedule of monthly payments as necessary. 35-A M.R.S.A. § 4354(6).

The only nuclear power plant located in Maine is the nuclear power plant in Wiscasset, Maine owned by the Maine Yankee Atomic Power Company, which in turn is owned by a group of investor-owned electric utilities (the sponsors) located in Maine, Massachusetts, New Hampshire, Connecticut and Vermont. Maine Yankee sells to the sponsors, at wholesale, its entire output of electricity. Because Maine Yankee sells electricity only at wholesale, the Federal Energy Regulatory Commission sets Maine Yankee's rates, pursuant to the Federal Power Act.

Maine Yankee has had decommissioning costs reflected by FERC in its rates since 1982.

B. The MPUC Proceeding Below.

The decommissioning plan filed by Maine Yankee with the MPUC included an estimated decommissioning cost of $167 million and annual payments into the trust fund of $9,073,943. Maine Yankee's proposed annual contribution and estimated cost were identical in amount to that stipulated to in a 1988 rate proceeding at the FERC. Maine Yankee's position was that the MPUC could not legally order an annual payment into the trust fund different than that reflected in its FERC-approved rates.

On February 22, 1990, the MPUC rejected Maine Yankee's position that the Commission was preempted from ordering decommissioning funding requirements different than FERC allowed in rates. The MPUC established the decommissioning funding requirement for Maine Yankee at $178,097,900, resulting in an order to Maine Yankee to increase its annual contributions to the decommissioning trust fund to $9,793,904. *Maine Yankee Atomic Power Co.*, Docket No. 82-179 (Me. PUC 1990).

C. The Appeal to the Supreme Judicial Court of Maine.

Maine Yankee appealed the Commission's February 22, 1990 order to the Supreme Judicial Court of Maine pursuant to 35-A M.R.S.A. § 1320. The Maine Court determined that federal law preempts the NDFA. The Maine Court issued its opinion and decision on October 25, 1990. Specifically, the Court found that the MPUC order and the NDFA are preempted for two reasons: (1) the February 22 order interferes impermissibly with FERC's jurisdiction over wholesale rates and (2) the NDFA

intrudes into the field of nuclear safety which has been pervasively and exclusively regulated by Congress.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted in this case (1) because of the national importance of decommissioning funding in general and because of the potential federal/state or multi-state conflict over decommissioning funding in particular[2] and (2) because the Maine Court's decision conflicts with the U.S. Supreme Court's decision in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), and is contrary to the intent of Congress as expressed in the Federal Power Act and the Atomic Energy Act.

I. The Issue of State Involvement in the Economic Regulation of Decommissioning Funding is One of National Importance.

There has been much public debate of the merits of nuclear power. Over the past two decades, the debate has

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[2] The potential conflict exists whenever ratemaking jurisdiction over a nuclear power plant is vested in agencies beyond the borders of the state where the plant is located. For instance, a number of nuclear plants are owned in joint tenancy by more than one electric utility, the output of which is sold in more than one state. Thus, the nuclear power plant in Seabrook, New Hampshire is jointly owned by electric utilities in New Hampshire, Massachusetts and Connecticut. The Nuclear Decommissioning Financing Committee in New Hampshire orders all owners to contribute to the Seabrook decommissioning trust fund. N.H. Rev. Stat. Ann. ch. 162-F:14-26 (1989). Yet, ratemaking jurisdiction over the Massachusetts and Connecticut utilities is vested in each of those respective states or the FERC.

centered on whether nuclear power plants should be built; whether they should be operated even after construction was complete; and, because costs of construction escalated significantly in the late 1970s and 1980s, whether ratepayers or shareholders should pay for the extra cost. The public debate will undoubtedly continue, and over the next twenty years will include a new emphasis on decommissioning of nuclear power plants.

Prior to 1977, the NRC had done very little in establishing decommissioning requirements. In 1977, two events occurred which helped prompt the NRC to take some action. In June 1977, the U.S. General Accounting Office (GAO) issued a report that cited the lack of progress regarding decommissioning plans, radiation standards and radioactive waste disposal. GAO concluded that determination of who should pay for nuclear decommissioning costs represented "one of the biggest problems that may confront the public in the future." U.S. General Accounting Office, *Cleaning Up the Remains of Nuclear Facilities – A Multi-Billion Dollar Problem*, EMD-77-46, at 25 (June 16, 1977).

In July, 1977 a number of environmental and consumer groups submitted a petition for rulemaking to the NRC requesting that the NRC establish decommissioning funding standards. The NRC issued an "Advance Notice" of Rulemaking in 1978, and an actual proposed rule in 1985. A rule was finally promulgated in 1988. *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018-56. (1988) (Amending 10 CFR Parts 30, 40, 50, 70 and 72.

The NRC has set the technical criteria which must be observed in order to assure adequate safety, including generic, minimum standards for funding. But the NRC rule was not designed and is not intended to be the exclusive means of establishing decommissioning funding levels. *See* 53 Fed. Reg. at 24037-24038.[3] The NRC specifically did not act to provide site-specific requirements.

There are 113 commercially licensed nuclear reactors producing electricity in the United States. NRC Information Digest, *NU Reg. 1350, Vol. II,* (March 1990). No large commercial nuclear reactor has yet been decommissioned. The largest reactor to have been decommissioned is the 72-MW Shippingport reactor at Shippingport, Pennsylvania. Maine Yankee by comparison, operates at 865-MW. Soon the industry will gain experience decommissioning some large plants. By 2010, almost one-third of the 113 reactors now operating are scheduled to retire. *Id.* For those plants, over one-half of the license life has elapsed. Moreover, the search for a disposal site for the spent fuel and other high-level radioactive waste, some of which is produced in the decommissioning process, and state or regional sites for low-level waste disposal is heightening the public awareness of the magnitude and urgency of the decommissioning planning, financial and otherwise, that soon must occur.

The decommissioning bill for these plants will be staggering. The total cost has been estimated to be $20

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[3] *See also* U.S. General Accounting Office, *Nuclear Regulation: NRC's Decommissioning Cost Estimates Appear Low,* RCED-88-184 (July 1988).

billion for the nuclear portion of the reactors alone, another $5 billion for the non-nuclear portion.[4] With such dollars at stake, it is not surprising that some state legislatures enacted statutes that require electric utilities to plan for this cost well in advance by setting aside the money that will be needed when the plant is shut down. Maine, California, Connecticut, New Hampshire and Illinois did so,[5] and other states may be expected to follow.

The states have a legitimate economic interest in assuring that nuclear power plants located on their soil will have the funds to pay for decommissioning. The Congress has recognized this interest. Under the Low Level Radioactive Waste Policy Act, 42 USC §§ 2021b-2021j (1988), it required each state be "responsible for providing, either by itself or in cooperation with other states, for the disposal of . . . low level radioactive waste generated within the State". 42 USC § 2021c(a)(1)-(a)(1)(A)(1988). In addition, the Act makes the state ultimately responsible, both financially and physically, for all low level waste in the event no

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[4] This figure is the estimate of the total cost by the nuclear utility industry. The NRC's minimum funding requirements are somewhat lower, about $12 billion in total. Some groups believe the industry's estimates are too conservative. Borson et al., *Payment Due: A Reactor-by-Reactor Assessment of the Nuclear Industry's $25+ Billion Decommissioning Bill*, (Public Citizen Critical Mass Energy Project, 1990).

[5] *See* Cal. Pub. Util. Code §§ 8321-8330 (West Supp. 1991); Conn. Gen. Stat. Ann. §§ 16-19m-16-19q (1988); N.H. Rev. Stat. Ann. ch. 162-F: 14-26 (Supp. 1989); Ill. Rev. Stat. ch. 111 2/3, § 8-508.1 (Supp. 1990).

provision for disposal is made by January 1, 1996.[6] For Maine Yankee, about 97% of the radioactive waste to be disposed of in the decommissioning process is low-level waste. (R. 2109, p. 103.)

The national importance of this problem is well recognized. Huge amounts of money are at stake, because decommissioning involves the disposal of radioactive waste. Yet adequate financial planning has been slow to occur and time is running out. Moreover, Congress has assigned ultimate responsibility for low-level waste to the States.

II. The Decision of the Maine Supreme Judicial Court that the NDFA is Preempted under the Supremacy Clause of the United States Constitution Conflicts with this Court's Ruling in *Pacific Gas & Electric v. Energy Resources Commission* and with Congressional Intent as Expressed in the Federal Power Act and the Atomic Energy Act.

Preemption analysis always starts with the presumption that Congress did not intend to displace state law.

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[6] 42 USC § 2021(d)(2)(c)(ii) provides in pertinent part:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

The principles of preemption analysis have been well defined by this Court.

First, Congress can state explicitly the extent to which federal laws preempt state law. Second, in the absence of explicit statutory language, state law can still be preempted when a congressional intent can be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it" or where legislation "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, state law is preempted to the extent that it actually conflicts with federal law. *English v. General Electric Company*, 495 U.S. ___, 110 S.Ct. 2270, 2275, 110 L. Ed 2d 65, 74 (1990).

Despite reciting these principles, the Maine Supreme Court fails to abide by them. The Court's holding that the NDFA is preempted rests upon two mutually inconsistent, although minimally articulated grounds. These grounds are:

1. That Maine's attempt to regulate decommissioning funding interferes with FERC's ratemaking authority and conflicts with FERC rate orders; and
2. That the NDFA intrudes into a field which has been pervasively regulated by Congress, presumably nuclear safety regulation, because:
    a. the NRC has conferred, by means of its safety rules and regulations, exclusive jurisdiction over decommissioning to

ratemaking agencies (in this case FERC); and

b. the NDFA is safety regulation which conflicts with NRC jurisdiction over safety matters.

The MPUC contends that setting site specific decommissioning amounts in accordance with NRC guidelines is neither ratemaking nor safety regulation, but rather, economic regulation as recognized by this Court in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983). The Maine Court's decision conflicts with *Pacific Gas & Electric*, misconceives the nature and sources of regulatory authority, and ignores the manifest intent of Congress in passing both the Federal Power Act and the Atomic Energy Act.

A. The Maine Act does Not Conflict with and is Not Preempted by FERC Rate Setting Authority under the FPA.

FERC derives its electric ratemaking jurisdiction from the Federal Power Act (FPA). There is no explicit mention of decommissioning in the FPA, and therefore, no explicit statement by Congress that FERC actions preempt state regulation on that subject.

The Federal Power Act as amended, 16 U.S.C. §§ 791-828c (1988), was originally passed in order to fill the regulatory gap left by the decision in *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927), which held that the states could not constitutionally set rates for sales of electricity at wholesale in interstate commerce. The Act was not intended to expand

the role of the federal government into areas of traditional state authority. *Connecticut Light and Power Co. v. FPC*, 324 U.S. 515, 525-531 (1945).

The extent of the FERC's jurisdiction, therefore, is to be measured by the extent of the regulatory gap left by the commerce clause cases such as *Attleboro*, and the FPA must be given preemptive effect only to the extent necessary to protect the achievement of the aims of the federal statute. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, 127 (1964).

FERC's primary responsibility is to regulate interstate and wholesale rates. The Maine Court held that the NDFA impermissibly interfered with FERC rate setting authority. *Maine Yankee v. MPUC*, 581 A.2d at 805. The Court simply assumed that imposing decommissioning cost requirements was a ratemaking function. For instance, the Maine Court states that decommissioning funding level is a stated amount which cannot vary without FERC approval, citing various FERC cases. *Id.* at 803-804. These FERC cases, however, merely determine the particular kind of FERC-defined rate schedule upon which decommissioning expenses should be charged to wholesale ratepayers, namely a "stated" rate rather than "formula" rate. Astonishingly, if FERC had classified decommissioning costs as part of a formula rate, a rate which by definition can vary without specific FERC approval, evidently the Maine Court would have held that decommissioning funding is not ratemaking. The distinction between formula and stated rates is irrelevant to the preemption analysis. It is true that given formula rate treatment, variations in cost will be immediately reflected in rates and thus will never affect return on

equity. Of course, if the NDFA were upheld, it would be logical for the FERC to classify decommissioning funding costs imposed by Maine as a formula rate, similar to the FERC's treatment of other state-imposed costs.

More importantly, Congressional intent does not hinge upon how decommissioning costs are categorized by FERC. The Maine Court does not provide any reasoning to support its conclusion that decommissioning funding is strictly a ratemaking function. Rather, the Court simply assumed away the critical issue in this case, namely whether *Congress intended* that decommissioning funding be strictly a ratemaking function.

The decommissioning financing tasks that have been delegated to the Public Utilities Commission by the Maine Legislature are not ratemaking in nature. The state regulation involves developing an estimate of the site-specific costs of returning a parcel of land in Wiscasset, Maine, to a condition fit for unrestricted public use in accordance with NRC guidelines. A proper determination of the costs of decommissioning a nuclear site is unaffected by any consideration of the utility's rate of return, depreciation, expenses, rate structure, or any other component or element of its cost of service. It is not rate regulation. Decommissioning financing is an imposition of cost upon a utility, not of rates upon ratepayers.[7]

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[7] If the NRC had implemented the same decommissioning funding requirements as the MPUC did on February 22, 1990, the NRC action would be valid. Yet, the NRC would thereby require Maine Yankee to increase funding levels without FERC approval, would reduce the rate of return earned by Maine

(Continued on following page)

There are several costs of doing business which state law imposes upon Maine Yankee: worker's compensation, corporate income tax, sales tax, property tax, and licensing fees for vehicles and equipment and many other economic and environmental regulations. These costs are imposed upon Maine Yankee and are reflected in its rates by FERC because they come within the legitimate scope of state authority and police power. But for all their undoubted effect upon the rates that Maine Yankee charges, they are costs and not rates.

Yet the Maine Court held that the MPUC action was "impermissible" because it decreased the amount of earnings realized by Maine Yankee's sponsors and weakened the Company's financial base. *Maine Yankee v. MPUC*, 581 A.2d at 804. In short, the Maine Court held State action preempted because it would have a temporary impact upon the profitability of producing nuclear power in the State of Maine – a purely economic impact. This Court has held in *Pacific Gas* that "the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 at 223 (1983).

(Continued from previous page)

Yankee shareholders, and create the same conflict between the FERC, March 15, 1988 rate order as the MPUC action on February 22, 1990. The NRC increased funding requirement would be valid, however, because decommissioning funding is not ratemaking and there is no impermissible conflict between the FERC order and the hypothetical NRC order. If it is not ratemaking when the NRC sets *minimum* funding requirements, it is likewise not ratemaking when Maine sets site-specific decommissioning funding requirements.

If economic regulation of nuclear power by the states is permissible, then such regulation cannot be held invalid on the grounds that it has an economic impact. Yet the Maine Court did so.

B. The Decision of the Maine Supreme Judicial Court that the Maine Act intrudes upon a field which has been pervasively regulated by Congress, conflicts with this Court's decision in *Pacific Gas & Electric v. Energy Resources Commission*.

The Supreme Court has recognized that the economic regulation of nuclear power has been left to the States as long as that regulation does not impinge upon NRC's safety jurisdiction. In *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), the Court discussed the preemptive scope of the Atomic Energy Act:

> [A]s we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

461 U.S. at 205.

The Nuclear Regulatory Commission has exclusive and complete control over the health and safety aspects of nuclear decommissioning. The NDFA itself recognizes the preeminent role to be played by the federal

government in this area.[8] The opinion in *Pacific Gas & Electric*, however, makes it clear that the States are granted great latitude as long as they do not attempt to intrude upon the jurisdiction of safety matters granted to the NRC.

In its pervasive scheme analysis, the Maine Court found decommissioning funding to be a matter of safety regulation, and to be within the exclusive jurisdiction of the NRC, citing *Pacific Gas & Electric. Maine Yankee v. MPUC*, 581 A.2d at 806. The Court apparently reasoned that the NRC has delegated its exclusive jurisdiction over safety matters in the sphere of decommissioning funding to ratemaking agencies:

> NRC's rule amendments permit the appropriate state or federal rate-setting agency to regulate funding for decommissioning; in the case of *wholesale* rate setting that agency would be FERC. [53 Fed Reg.] at 24037-38.

581 A.2d at 805.

First, a reading of the NRC rule simply does not support the assumption that the NRC either attempted or intended to delineate the spheres of influence between

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[8] See, e.g., 35-A M.R.S.A. § 4353(4) ("For purposes of cost estimates, the method of decommissioning shall be the method of prompt removal and dismantlement, unless the United States Nuclear Regulatory Commission . . . requires another method.") 35-A M.R.S.A. § 4353(7) (" . . . the commission (PUC) may not duplicate the health and safety review conducted by the United States Nuclear Regulatory Commission . . . .").

state and federal authority over site-specific decommissioning funding.[9]

Second, this assumption is made without any analysis of the NRC's authority to delegate its preemptive, exclusive jurisdiction to other federal or state agencies. No such authority exists. Congress, not the NRC, determines the extent of FERC's jurisdiction. In *Pacific Gas & Electric*, this Court recognized that states retain their traditional authority over economic aspects of nuclear power. The NRC cannot preempt that traditional authority by "delegating" its exclusive jurisdiction to another agency. If the NRC itself has not preempted state action in setting site specific cost estimates, it cannot empower the FERC to do so.

By assuming this interagency transfer of exclusive jurisdiction, the Maine Court's analysis ignores the crucial question of whether *Congress* intended the FERC, primarily a rate setting body established to deal with those matters which are beyond the pale of effective state supervision,[10] to override the State's authority to financially plan for the safe decommissioning of a nuclear power plant located on its own soil. What the NRC may have assumed or intended is not relevant to the extent of

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[9] 10 C.F.R. § 50.75(a) (1990) simply reads:

> Funding for decommissioning of electric utilities is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation."

[10] *See Connecticut Light and Power Co. v. FPC*, 324 U.S. at 525-531.

FERC jurisdiction. The NRC has not been granted authority to expand the preemptive scope of FERC regulation by means of its rules. The preemptive effect of any federal regulation is limited by the authority legislatively granted because "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

The NDFA does not conflict with NRC safety regulations. As noted above, it recognizes the NRC's complete jurisdiction over decommissioning methods, funding regulations and minimum funding amounts. The question before this Court, ignored by the Court below, is whether *Congress intended* the FERC to have preemptive authority in the field of nuclear decommissioning financing by virtue of its *rate* setting authority. This Court's opinion in *Pacific Gas* recognizes Congressional intent "that the states retain their traditional responsibilities in the field of regulating electric utilities for determining questions of need, reliability, cost and other related state concerns." 461 U.S. at 205. The setting by Maine of a site-specific decommissioning amount in accordance with NRC guidelines for a nuclear power plant located on its own soil is legitimate economic regulation of nuclear power in accordance with the holding of *Pacific Gas*.

CONCLUSION

For the reasons stated, certiorari should be granted in this case.

Respectfully submitted,

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January, 1991

APPENDIX A

MAINE YANKEE ATOMIC POWER COMPANY

v.

MAINE PUBLIC UTILITIES COMMISSION

Argued September 18, 1990
Decided October 25, 1990

Before ROBERTS, WATHEN, GLASSMAN, CLIFFORD, COLLINS, and BRODY, JJ.

WATHEN, J.

Maine Yankee Atomic Power Company ("Maine Yankee") appeals the February 22, 1990 order of the Maine Public Utilities Commission ("MPUC") purporting to establish Maine Yankee's cost of decommissioning and to fix the amounts which Maine Yankee must pay annually to its decommissioning trust fund, pursuant to Maine's Nuclear Decommissioning Financing Act ("NDFA"), 35-A M.R.S.A. §§ 4351-4359 (1988).

At the heart of this appeal lies a jurisdictional issue. Maine Yankee maintains that a federal agency, the Nuclear Regulatory Commission ("NRC"), has exclusive jurisdiction over nuclear decommissioning which it exercises in conjunction with the ratemaking agency, the Federal Energy Regulatory Commission ("FERC"). The MPUC, however, asserts that it has concurrent jurisdiction to review and approve any proposed decommissioning financing plan, pursuant to the NDFA. We determine that federal law preempts the NDFA.

Maine Yankee, a licensed nuclear electric generating facility in Wiscasset, is owned by a group of investor-owned electric utilities ("the sponsors") located in Maine,

Massachusetts, New Hampshire, Connecticut, and Vermont. Maine Yankee sells to these sponsors, at wholesale, its entire output of electricity on a basis proportional to each sponsor's ownership of the company.

Pursuant to the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, the NRC is statutorily mandated "to protect the radiological health and safety of the public." General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24018, 24037 (1988). In keeping with this mandate, the NRC promulgated a rule requiring

> reasonable assurance that at the time of the termination of operations [of nuclear facilities] adequate funds are available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems.

Id. On July 27, 1988, the NRC's general requirements for decommissioning nuclear facilities became effective. *Id.* at 24018-19.

Although the NRC is not authorized to regulate rates or to interfere with the decisions of state or federal agencies respecting the economics of nuclear power, the NRC is responsible for promulgating "rules prescribing allowable funding methods for meeting decommissioning costs." *Id.* (citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 212-13, 217-19 (1983)). In setting forth technical and financial criteria for decommissioning licensed nuclear facilities, the NRC took care to clarify the roles of the state

public utility commissions and the Federal Energy Regulatory Commission. To FERC the NRC ascribes

> the responsibility for setting rates for the *transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce* and authorizes the conditions, rates, and charges for interconnections among electric utilities. . . . State public utility commissions have the responsibility for setting rates for *retail* sales of electricity to homeowners and companies doing business in their states.

53 Fed. Reg. at 24037-38 (emphasis added). As a company engaged in the "transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce," Maine Yankee is subject only to the jurisdiction of FERC for the regulation of its utility service and rates. The rates fixed by FERC provide for the costs of operating the plant as well as a return through depreciation of Maine Yankee's investment in the plant. Thus, Maine Yankee asserts that FERC has jurisdiction over its decommissioning plan since "decommissioning expenses have historically been and continue to be treated by FERC as depreciation and booked as negative salvage."

On October 5, 1981, Maine Yankee made a rate increase filing with FERC, seeking "to reflect in its rates the estimated costs of decommissioning" its nuclear generating plant. *Maine Yankee Atomic Power Company,* 20 F.E.R.C. ¶61,141 at p. 61,308 (1982). On October 29, 1981, the MPUC filed a notice of intervention with FERC and took the position that Maine Yankee should "supplement or modify its filing with a 'rate schedule' which provides for (1) the billing of decommissioning costs in accordance with the method approved by the M.P.U.C. . . . and (2) the

segregation of decommissioning funds in a separate account to be used solely for decommissioning purposes." On March 30, 1982, Maine Yankee filed a proposed settlement agreement which attempted to resolve the issues in the subsequent FERC proceeding. *Id.* Meanwhile, on April 15, 1982, the Maine Legislature enacted the Nuclear Decommissioning Financing Act, now codified at 35-A M.R.S.A. §§ 4351-4359 (1988). The NDFA creates a specific mechanism for establishing a decommissioning financing plan and requires any licensee operating a nuclear power plant in Maine to file a proposed plan with the MPUC for review and ultimate approval. *Id.* at § 4353(1-3).

On August 3, 1982, FERC issued its order approving the March 30, 1982 settlement agreement and expressing the view, with regard to the NDFA, that there should be "consistency with the states . . . to the extent that it allows us to properly carry out our duties under the Federal Power Act." *Maine Yankee Atomic Power Company,* 20 F.E.R.C. at p. 61,310. The MPUC did not appeal this order. Since that time, Maine Yankee and the other parties to this litigation, including the MPUC, have participated in litigated FERC proceedings in 1985 and 1988. *Maine Yankee Atomic Power Company,* 31 F.E.R.C. ¶61,068 (1985); *Maine Yankee Atomic Power Company,* 44 F.E.R.C. ¶61,368 (1988). In each of these cases, the parties negotiated the appropriate cost estimate and funding level for decommissioning expenses and reached a binding settlement; no appeals were taken.

On September 13, 1982, Maine Yankee filed its proposed decommissioning financing plan with the MPUC; on November 12, 1982, the MPUC notified the company

that its filing was incomplete; and on December 7, 1982, the MPUC granted Maine Yankee's request for additional time to supplement its filing. Since then, both parties continued to process the case, but no final plan was ever approved by the MPUC. On August 29, 1983, the MPUC approved a stipulation entered into by the parties as an interim decommissioning financing plan.

On January 15, 1988, Maine Yankee petitioned FERC to modify the period over which it would collect decommissioning costs to 10 years, increase its annual decommissioning charges accordingly, and decrease the level of return on common equity that the company could collect. *Maine Yankee Atomic Power Company*, 42 F.E.R.C. at p. 61,920. According to Maine Yankee, these changes "would have permitted the company to fix decommissioning expense based on Maine Yankee's most recent estimate of $178,097,900 and to fund for decommissioning expense at the level of $14,466,467 per year over the course of ten years." On February 8, 1988, the MPUC filed an intervention, making it a party to the proceeding. *Id.*, at p. 61,320-21. In its March 15, 1988 order, FERC rejected Maine Yankee's proposed accelerated decommissioning schedule and required the company to "file revised rates, reflecting recovery of decommissioning costs over the nuclear unit's remaining life." *Id.* at p. 61,923.

On July 27, 1988, Maine Yankee submitted an uncontested settlement agreement which FERC approved on September 20, 1988, establishing a decommissioning cost basis of $167,000,000 and a fixed rate of return on common equity at 12.9%. *Maine Yankee Atomic Power Company*, 44 F.E.R.C. ¶61,368 at p. 62,224 (1988). In addition, the parties agreed to a "stay-out" provision prohibiting

Maine Yankee from making "a filing to place into effect prior to February 16, 1991, any increase in the level of annual decommissioning charges above that stated in [the settlement agreement]."

On March 20, 1989, Maine Yankee moved that the MPUC approve an amendment to the August 29, 1982 interim decommissioning financing plan which reflected the provisions of the September 20, 1988 FERC order, converting it into an MPUC-approved decommissioning finance plan. On November 17, 1989, hearings began on the issue, and, on November 29, 1989, Maine Yankee, the Public Advocate, and the Industrial Energy Consumer Group ("IECG")[1] filed a stipulation of the issues in the case. On February 22, 1990, the MPUC rejected the stipulation and Maine Yankee's decommissioning financing plan, finding that "$178,097,900 is the most reasonable estimated cost of decommissioning," and ordered that Maine Yankee increase, effective March 1, 1990, its annual contributions to the decommissioning trust fund by $719,961, for a total contribution of $9,793, 904.

On March 23, 1990, the MPUC stated that additional funding amounts required under its February 22, 1990 order must be supplied from Maine Yankee's assets or the

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[1] The Industrial Energy Consumer Group ("IECG") is an incorporated association of large industrial consumers of energy located within the State of Maine. Its members are Champion International, International Paper Company, Keyes Fibre Company, United Timber Corporation, Cyro Industries, the Maine Textile Council, Boise Cascade Corporation, Forester Manufacturing Company and James River Corporation. A petition to intervene was filed by this group on May 24, 1989, and subsequently granted.

assets of the sponsors, and granted a request to stay the February 22, 1990 order pending Maine Yankee's appeal to this Court.

The supremacy clause of the United States Constitution provides that the law of the United States "shall be the supreme Law of the Land. . . . U.S. Const. art. VI, cl. 2. Thus under certain circumstances, federal law will preempt even validly enacted state law. In the recent case of *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990), we reiterated the principles of preemption:

> "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Id. at 1191 (quoting *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (citations omitted)). The exercise of federal supremacy should not be presumed lightly. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d at 1191. Nevertheless, when no other conclusion is possible given the nature of the regulated subject matter, or Congress has clearly ordained this result, federal law must preempt conflicting state law. *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1057 (Me. 1986).

Preemption occurs whenever state law conflicts with federal law in such a way that it becomes impossible to comply with both simultaneously. *California v. F.E.R.C.* No. 89-333, slip op. at 4 (S. Ct. May 21, 1990) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)); *see also Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 (1988). Such a conflict "may be direct, in that the state regulation obviously contradicts federal regulation, or it may arise from Congressional intent, either express or implied, to occupy a particular area." *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d at 1057. Courts must first ascertain the objectives of Congress before determining whether a state statute hinders the achievement of federal policy. *Bayside Enterprises v. Maine Agricultural Bargaining Board*, 513 A.2d 1355, 1358 (Me. 1986).

A federal agency acting within the scope of its congressionally delegated authority may also preempt state regulation. *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. at 369; *see also Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.") Thus, if the NRC and FERC are acting within the scope of their congressionally delegated authority in asserting exclusive jurisdiction over Maine Yankee's decommissioning plan, the MPUC order and the NDFA are preempted.

Maine Yankee claims that the MPUC order and the NDFA should be preempted because (1) they interfere impermissibly with FERC's jurisdiction over wholesale rates and (2) they intrude on a field which has been pervasively and exclusively regulated by Congress.

1. Impermissible interference with FERC's jurisdiction

It is undisputed that FERC has jurisdiction for setting rates for "the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce." 53 Fed. Reg. at 24037-38; *see also Mississippi Power & Light Co. v. Moore*, 108 S. Ct. 2428, 2439 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."). Maine Yankee argues that the MPUC order directly conflicts with the valid exercise of this ratemaking jurisdiction in several significant respects.

FERC's March 15, 1988 rate order included four specific components of Maine Yankee's costs of service: 1) the rate of return on common equity; 2) amortization of materials and supplies and last core nuclear fuel; 3) decommissioning expense; and 4) other depreciation. The MPUC order, retroactive to March 1, 1990, alters the effect of this order, fixing Maine Yankee's decommissioning expense at $719,961 more per year than the March 15, 1988 FERC order and providing for Maine Yankee's sponsors a lower rate of return.

The decommissioning funding level is a stated amount which cannot vary without FERC approval. *Central Vermont Public Service Corp.*, 44 F.E.R.C. ¶61,278 at p. 62,027 (1988); *see also Yankee Atomic Electric Co.*, 30 F.E.R.C. ¶61,111, at 61,202 (1985). It is one cost of service component which contributes to the establishment of Maine Yankee's utility rate. Under the "filed rate doctrine" developed under federal law, a federally regulated utility is precluded from collecting any rate other than that on file with the Commission, and the MPUC cannot

interfere with the rate set by FERC or the components that go into it. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986); *see Mississippi Power & Light Co. v. Moore*, 108 S.Ct. at 2438-39.

FERC has held that decommissioning expense, like depreciation, should be collected from ratepayers as a cost of service. *Indiana and Michigan Municipal Distributors Association v. Indiana Michigan Power Co.*, 49 F.E.R.C. ¶63,020 at p. 65,084 (1989); *Middle South Energy, Inc.*, 31 F.E.R.C. ¶61,305 at p. 61,685 (1985). Pursuant to the "stay-out" provision in the March 15, 1988 FERC order, however, Maine Yankee cannot file for a rate increase that would become effective prior to February 16, 1991. Thus, the company is prevented from raising the revenues necessary to meet the demands of the MPUC order, retroactive to March 1, 1990, by FERC's requirement that decommissioning costs come from ratepayers and Maine Yankee's agreement to delay any rate increase until after February 16, 1991. Given this scenario, it is impossible for Maine Yankee to comply with both the March 15, 1988 FERC order and the February 22, 1990 MPUC order. Applying the principles of preemption set forth earlier, the MPUC order is preempted.

Contrary to FERC policy, the MPUC has directed Maine Yankee to raise revenues from the company's own assets and the assets of its sponsors. FERC fixed the rate of return for Maine Yankee's sponsors at 12.9% in the March 15, 1988 order. In requiring that additional funding for decommissioning come from the assets of Maine Yankee and its sponsors, the MPUC is impermissibly mandating a reduction in the sponsors' rate of return and weakening the company's financial base. The MPUC has

no authority to require a reduction in a component of Maine Yankee's rates, set exclusively by FERC. Any attempt to do so is preempted by FERC. *See Safe Harbor Water Power Corp. v. Federal Power Comm.*, 179 F.2d 171, 201 (3rd Cir. 1949) ("The amount of rate of return is preeminently a question for determination by the Commission."[2]); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (Setting valid rates enables a company "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.")

Without merit is the MPUC's assertion that its order does not interfere with rate setting, but, like a state income tax, merely affects Maine Yankee's rates indirectly. The United States Supreme Court has held that "the filed rate doctrine is not limited to 'rates' *per se*." *Nantahala v. Thornburg*, 476 U.S. at 966. In *Mississippi Power & Light Co. v. Moore*, the Court stated that FERC's exclusive jurisdiction applies not only to rates, but to the components that affect wholesale rates. *Mississippi Power & Light Co. v. Moore*, 108 S. Ct. at 2439 ("FERC's exclusive jurisdiction applies not only to rates, but also to power allocations that affect wholesale rates.") While in that case the component at issue was power allocations, the principle applies equally well to decommissioning financing. Both directly affect the calculation of reasonable

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[2] The Federal Power Commission ("FPC") was FERC's predecessor as a ratemaking agency. Responsibility for the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy was transferred from the FPC to FERC by sections 717(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare. 16 U.S.C. § 824a (1985).

wholesale rates over which FERC exercises exclusive jurisdiction. Furthermore, the impact of the decommissioning financing plan imposed by the MPUC cannot validly be compared to the impact of a state tax. State taxes are not set by the federal government while Maine Yankee's decommissioning expenses are and have been set by FERC.

Thus, the MPUC order and the NDFA interfere impermissibly with FERC's exclusive jurisdiction over wholesale rates and are preempted by the supremacy clause of the United States Constitution.

2. *Intrusion on a field which has been pervasively and exclusively regulated by Congress*

When Congress has manifested an intent to occupy a particular area through a comprehensive scheme of federal regulation, federal law will preempt state regulation in that area. Congressional intent to occupy an area of law

> may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." . . . [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law.

Schneidewind v. ANR Pipeline Co., 108 S. Ct. at 1150 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983), the Supreme Court made it clear that state regulation of nuclear power is preempted when its purpose is to regulate safety, even when it does not directly conflict with federal law, because "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Id.* at 212. Since the passage of the Atomic Energy Act in 1954, Congress has preserved a dual system of regulation, with the federal government maintaining "complete control of the safety and 'nuclear' aspects of energy generation" and the states exercising traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, [retail] ratemaking, and the like." *Id.*

Maine Yankee argues that "federal law governs nuclear decommissioning chiefly through three interrelated regulatory schemes:" (1)Nuclear Regulatory Commission regulations; (2) certain provisions of the Federal Power Act; (3) section 468A of the Internal Revenue Code.

The MPUC concedes that the NRC has exclusive control over the health and safety aspects of nuclear decommissioning. It disputes, however, the validity of Maine Yankee's assertion that NRC's jurisdiction extends to the economics of decommissioning.

Economic regulation of nuclear power has traditionally been granted to the states. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. at 212. Nevertheless, the NRC has

acknowledged its authority, granted by the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, to

> take whatever regulatory actions may be necessary to protect the public health and safety, including the promulgation of rules prescribing allowable funding methods for meeting decommissioning costs. The fact that these regulatory actions may have an economic impact does not mean that they lie outside NRC's jurisdiction.

53 Fed. Reg. at 24037 (citations omitted). NRC's rule amendments permit the appropriate state or federal rate-setting agency to regulate funding for decommissioning; in the case of *wholesale* rate setting, that agency would be FERC. *Id.* at 24037-38.

The Federal Power Act, 16 U.S.C. §§ 824-825, declares that there will be federal regulation "of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," provided this regulation extends "only to those matters which are not subject to regulation by the States." *Id.* at § 824(a). In this case, the decommissioning of an atomic power plant engaged in the wholesale marketing of electricity in interstate commerce is not a matter subject to regulation by the state. Thus, by the authority of the Federal Power Act, state regulation must be preempted in this area.

It is undisputed that FERC requires utilities over which it exercises jurisdiction to follow I.R.C. § 468A (1988) which permits deductibility of amounts contributed to the decommissioning trust fund only to the extent such expense is included in rates. Maine Yankee contends

that FERC's incorporation of IRC § 468A into the FERC regulatory scheme, as occurred in *Systems Energy Resources, Inc.*, 37 F.E.R.C. 61,261 (1986) ("SERI") "shows that the IRS regulations are not only a direct federal oversight of decommissioning fund policy, but are also inextricably interwoven into FERC's exercise of its own jurisdiction." *Id.* at 61,726-27. The MPUC disputes this contention, claiming that Maine Yankee has failed to show that this incorporation indicates that Congress has granted IRS federal oversight of decommissioning fund policy. In either case, this issue is not determinative as it has already been shown that Congress intended to dominate the field of nuclear safety concerns.

When "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose" as those sought by state regulation, the state regulation is preempted. *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. at 1150 (citation omitted). In enacting the NDFA, the Legislature stated that "timely proper decommissioning of any nuclear power plant . . . is essential to protect public health, safety and the environment." 35-A M.R.S.A. at § 4351. Because Congress has clearly manifested an intent to maintain "complete control over the safety and 'nuclear' aspects of energy generation," the NDFA is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. at 212.

The entry is:

The February 22, 1990 order is vacated.

All concurring.

APPENDIX B

STATE OF MAINE PUBLIC UTILITIES COMMISSION

Docket No. 82-179
February 22, 1990

MAINE YANKEE ATOMIC POWER COMPANY Re: Decommissioning Financing Plan

ORDER

GORDON, Chairman; HARRINGTON and PAINE, Commissioners

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I. PROCEDURAL HISTORY

The Maine Legislature in 1981 enacted the Nuclear Decommissioning Financing Act (NDFA) (now codified at

35-A M.R.S.A. §§ 4351-4359), which requires any licensee of a nuclear power plant in Maine to establish an external trust fund and contribute sufficient money into that fund to pay the ultimate cost of decommissioning the plant at the end of its useful life. Section 4351(1) describes the underlying purpose of this legislation: "the Legislature finds that timely proper decommissioning of any nuclear power plant beginning at the time of its closing is essential to protect public health, safety and the environment and that the cost of decommissioning will be significant." On September 13, 1982, Maine Yankee Atomic Power Company filed its decommissioning financing plan with the Commission. On November 12, 1982, the Commission notified Maine Yankee that its filing was not complete because Maine Yankee failed to provide all of the information required by 35-A M.R.S.A. § 3353(2). The Commission directed Maine Yankee to correct these deficiencies within 30 days. On December 7, 1982, the Commission granted Maine Yankee's request for additional time to supplement its filing and correct the deficiencies of its filed plan.

During the next several years, Maine Yankee supplemented its filing, including obtaining the necessary agreements between the licensee and each owner of the licensee as to ultimate financial responsibility for decommissioning. Maine Yankee has also twice filed new decommissioning cost studies, both of which were prepared by TLG Engineering, Inc. The first new study was filed on June 30, 1983, and the latest such study was done in December, 1987 and filed with the Commission on March 20, 1989.

Because of the deficiencies in Maine Yankee's original filing, no plan was ever finally approved by the Commission. Section 3353(5)(B) (now codified at 35-A M.R.S.A. § 4353(5)(B)) required that the Commission promulgate an interim decommissioning financing plan one year after the effective date of the Act if a plan had not been finally approved by the Commission. Pursuant to this requirement, the parties to this case at that time, the Staff, Public Advocate and Maine Yankee entered into a Stipulation on August 16, 1983, which provided that the then present arrangement, namely that Maine Yankee's recovery of $1,826,100 annually to cover projected decommissioning costs from customers of Maine Yankee pursuant to an Order Approving Settlement issued by the FERC on August 3, 1982, constituted a reasonable interim plan pending completion of the Commission's review of the permanent plan in this docket. On August 29, 1983, the Commission approved the Stipulation and thereby ordered it into effect pending final resolution of this proceeding.

In 1988, Maine Yankee petitioned FERC to approve a new wholesale rate which would have permitted Maine Yankee to collect the total cost of decommissioning at the rate of $14,466,467 per year over the course of 10 years for a total decommissioning cost of approximately $178,000,000. Maine Yankee's plan thus essentially was based on a reduction of the recovery period from 20 to 10 years. FERC summarily rejected Maine Yankee's rate filing. FERC subsequently ruled that the proper period for recovering decommissioning costs was the licensed life of the plant. 44 F.E.R.C. ¶ 61,453 (1988). Subsequently FERC approved a stipulation that permits Maine Yankee to

recover $9,073,943 per year in rates for a total recovery of $167,000,000 in 1987 dollars. The stipulation, signed by Maine Yankee, the Public Advocate and the Municipal Customer Group and approved by FERC also included a "stay out" provision prohibiting Maine Yankee from filing for recovery of increased decommissioning costs before January 1991.

On March 20, 1989, Maine Yankee filed a Motion to Amend Interim Decommissioning Financing Plan and to Approve the Interim Plan as Amended as the Final Decommissioning Financing Plan. The Motion requested the Commission to approve the amendments to the Company's interim decommissioning financing plan and then convert the interim decommissioning financing plan as amended to an approved decommissioning financing plan under 35-A M.R.S.A. § 4353(3). The amendments offered include the latest (1987) engineering study by TLG Engineering, Inc. to estimate the decommissioning cost. The 1987 study concludes that the total cost of decommissioning the plant utilizing the prompt removal and dismantlement technique is $178,073,900, including a 25% contingency allowance. The study also updates information concerning the insurance obtained by Maine Yankee in 1984 in the nature of all nuclear property damage insurance and sponsor guarantees to pay decommissioning costs in full.

On May 2, 1989, the Commission published Notice of Maine Yankee's Motion in newspapers of general circulation in Maine Yankee's customer's service areas in Maine and the Examiner issued a Procedural Order to the same effect. The Notice and Procedural Order set a deadline for petitions to intervene of May 24, 1989. A petition to

intervene was filed by the Industrial Energy Consumers Group and was subsequently granted. The other parties to this proceeding are Maine Yankee, Staff and the Public Advocate. On May 12, 1989, the Administrative Director, acting in accordance with 35-A M.R.S.A. § 4353(3)(D), found Maine Yankee's filing to be complete.

On September 8, 1989, a prehearing conference was held in this proceeding. At this conference it became apparent that significant differences of opinion existed among the parties concerning the possible preemptive effect of the 1988 FERC settlement order on the scope of the Commission's authority to act pursuant to the NDFA. A public witness hearing was also held on September 8, 1989 at which one public witness testified, Mr. Phillip Merletti.

On October 12, 1989, Maine Yankee filed a Motion for a Prehearing Order and Motion *In Limine* with supporting memoranda. Maine Yankee sought in its Motion, *inter alia*, a ruling from the Examiner concerning the scope of any evidentiary hearing held on the merits of Maine Yankee's proposed final decommissioning financing plan. Specifically, Maine Yankee requested that any issues relating to increasing the level and accelerating the collection of funds for decommissioning be excluded from this proceeding because the Commission is preempted by federal law from ordering changes to the level or timing of collection of funds for decommissioning.

The Commission, on October 24, 1989, issued an Order concerning the time within which a final decision was required by statute to be issued. Pursuant to section 4353(3)(D) the Commission "shall take final action" on

the proposed decommissioning financing plan within 180 days after the filing date. Because the Commission found the filing complete on May 12, 1989, the statutory deadline for "final action" became November 8, 1989. In its October 24 Order, however, the Commission recognized that Maine Yankee's Motion *in Limine* had the effect of rendering a decision by November 8, 1989 impractical. The Commission noted that "[i]t is . . . apparent that the briefing of these issues and their resolution and subsequent final action on Maine Yankee's proposed decommissioning financing plan will require an extension of the 180-day statutory deadline." The Commission in its order decided that the 180-day decision deadline was directory rather than mandatory and therefore subject to extension. All parties also agreed that the deadline could be extended beyond the 180 days described in the statute. The Commission accordingly found that it was in the public interest to extend the deadline to allow a full exploration of the legal issues raised by the parties as well as to allow adequate time for evidentiary hearings. The deadline for final Commission action was extended 30 days to December 8, 1989. The deadline was again extended, by agreement of the parties, to January 29, 1990.

On November 3, 1989, the Examiner issued a Procedural Order responding in part to Maine Yankee's Motion for Clarification and Motion for Prehearing Conference dated October 25, 1989. In that Procedural Order the Examiner ruled, *inter alia*, that hearings on the substantive issues concerning Maine Yankee's decommissioning financing plan would proceed as scheduled even though not all legal questions concerning preemption and

estoppel had been decided. Staff was therefore not prohibited from presenting testimony concerning alternative funding and timing scenarios.

On November 7, 1989, Maine Yankee prefiled the testimony of Mr. Patrick S. Lydon, Vice President of Finance and Administration and Chief Financial Officer of Maine Yankee. Staff, also on November 7, prefiled the testimony of Dr. Thomas D. Austin, Director of Finance, Maine Public Utilities Commission. Hearings began on November 17, 1989, at which Mr. Lydon and Dr. Austin were cross-examined. On November 28, 1989, Maine Yankee prefiled the rebuttal testimony of James F. Callahan and Ronald D. Jones. Staff, on November 30, 1989, prefiled the surrebuttal testimony of Dr. Austin. Further evidentiary hearings were held on December 4, 1989 at which Dr. Austin and Mr. Callahan testified. Staff filed, on November 30, 1989, a Motion to Strike the Testimony of Ronald D. Jones on relevancy and other grounds. This Motion was granted by Procedural Order dated December 4, 1989.

On November 29, 1989, a comprehensive stipulation of the issues in this proceeding was filed by the IECG, the Public Advocate and Maine Yankee. Staff filed a memorandum in opposition to the Stipulation on December 1, 1989. A hearing on the Stipulation was held on December 15, 1989.

Briefs were filed by Maine Yankee, Staff and the Public Advocate on December 18, 1989 and Reply Briefs were filed on December 26, 1989.

II. BURDEN OF PROOF

The NDFA requires any licensee operating a nuclear power plant within Maine to file a proposed decommissioning financing plan with the Public Utilities Commission and for the Commission to review that plan and ultimately approve a decommissioning financing plan. 35-A M.R.S.A. § 4353(2) and (3). In reviewing a plan, the Commission must find that the plan provides reasonable assurance that, among other things, contributions to the decommissioning fund are equitably spread over the useful life of the plant to the extent feasible and that the plans and options for insuring against or otherwise financing any shortfall in the fund resulting from a premature closing are adequate and reasonable. 35-A M.R.S.A. § 4353(3)(b)(6) and (7). Finally, if the Commission finds that any plan submitted by a licensee does not provide reasonable assurance that the criteria mentioned in the statute are satisfied, then the Commission must reject the plan and order that the plan be modified as the Commission determines necessary to meet those criteria. 35-A M.R.S.A. § 4353(3)(c).

The Act goes on to require the Commission to establish the cost of decommissioning of any nuclear power plant located in the state and to establish a schedule of monthly payments into the decommissioning trust fund established for that plant as necessary and convenient to meet that cost of decommissioning at the time of closing. The Legislature required, for purposes of cost estimates, that the method of prompt removal and dismantlement be used as the method of decommissioning, unless the United States Nuclear Regulatory Commission or its successor requires another method. 35-A M.R.S.A. § 4353(4).

Because decommissioning may not occur for a long time, the Commission must periodically review the estimated costs of decommissioning at least every five years and, based upon that review, revise the schedule of monthly payments as necessary. 35-A M.R.S.A. § 4353(6).

This statutory scheme unequivocally places the burden of proof on the utility to demonstrate that each element of its decommissioning plan is reasonable. If we determine that the utility has failed to prove that a portion of its plan is reasonable, we must modify the plan in a manner that results in a reasonable plan in all respects.

III. PREEMPTION

A central issue in this case has been whether the Commission is preempted from entering an order inconsistent with the terms of the recent settlement agreement approved by FERC concerning Maine Yankee's wholesale rates and, in particular, the decommissioning costs reflected in those rates. See Maine Yankee Exhibit 2, at 126. Maine Yankee argues that we would be preempted upon entering such an order by operation of the Supremacy Clause to the United States Constitution. Maine Yankee therefore urges us to decline to enter an order that would require Maine Yankee to pay into the decommissioning trust fund an amount different from what Maine Yankee is currently collecting in its wholesale rates and paying into the fund pursuant to the FERC-approved settlement agreement.

A. Maine Yankee's Position

Maine Yankee in its brief argues that we are preempted by the FERC's activities in the area of decommissioning costs under two distinct preemption theories. First, Maine Yankee argues that a pervasive scheme of federal regulation exists that, when viewed in its totality, "combine[s] to pervasively control the field of nuclear decommissioning . . . ." Maine Yankee Brief at 30. Second, Maine Yankee argues that the NDFA and any order we might issue that is inconsistent with FERC's decision concerning decommissioning costs in FERC docket ER88-202 directly conflicts with provisions of the Federal Power Act.

Maine Yankee notes, correctly, that federal law influences how utilities deal with the subject of decommissioning costs through the operation of three regulatory schemes: the regulations of the Nuclear Regulatory Commission (NRC) (10 C.F.R. Parts 30, 40, 50, 51, 70 and 72 (1989)), provisions of the Federal Power Act (FPA) (16 U.S.C.A. § 824 et. seq.) and a provision of the Internal Revenue Code (IRC) dealing with the deductibility of nuclear decommissioning costs, I.R.C. section 468A. Pursuant to an established line of U.S. Supreme Court decisions, congressional intent to occupy an area of law "may be inferred where the pervasiveness of the federal regulation precludes supplementation by the states, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.' " Maine Yankee Brief at 30, quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. ___, 108 S.Ct. 1145, 1150 (1988).

Maine Yankee analyzes the NRC regulations concerning decommissioning promulgated in 1988 and concludes based on that analysis that the NRC has, in effect, delegated to FERC the authority to actually set a decommissioning cost, at least for wholesale utilities. Maine Yankee notes that the NRC explicitly regulates decommissioning alternatives, decommissioning planning, assurance of availability of funds for decommissioning and environmental review. *See* 53 Fed. Reg. 24018-19. The NRC also sets minimum amounts (expressed in January 1986 dollars) required to demonstrate reasonable assurance of funds for decommissioning by reactor type and power level. 10 C.F.R. part 50.75. The NRC rules state, however, that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation. The requirements of this section, in particular paragraph (c) [setting minimum amounts] are in addition to, and not substitution for, other requirements, and are not intended to be used, by themselves, by other agencies to establish rates." 10 C.F.R. part 50.75(a).

Maine Yankee apparently concludes, based on these sections of the NRC regulations, that while the NRC does not and would not in and of itself preempt a state from setting a decommissioning cost for a wholesale utility, the NRC regulations appear to contemplate that regulatory bodies with rate setting authority would exercise primary jurisdiction over decommissioning costs. Maine Yankee, of course, concludes that because FERC is its rate regulator, only FERC may set its decommissioning cost.

The second leg of Maine Yankee's argument concerning a "pervasive scheme" is that because under the Federal Power Act FERC is granted exclusive jurisdiction over the fixing of wholesale power rates, the Maine Commission is without authority to enter an order that would conflict, or have the tendency to interfere with, a FERC established rate. Maine Yankee argues that entering such an order would lead to a direct conflict because such an order would either be the functional equivalent of setting a rate or would impermissibly interfere with that rate.

Maine Yankee argues specifically that FERC has extended its exclusive jurisdiction over ratemaking to the establishment of, and regulation of collections for, decommissioning trust funds. Maine Yankee asserts that FERC's authority to set decommissioning costs stems from its overall authority to establish a cost of service prior to actually setting rates to reflect that cost of service. Maine Yankee relies on the rate setting provisions of the Federal Power Act, 16 U.S.C.A. section 824 et seq., particularly section 824e, to support its position. Maine Yankee also cites several FERC decisions in which FERC took upon itself the responsibility to review and approve decommissioning financing plans. *See, e.g.*, Systems Energy Resources, Inc., 37 FERC § 61,261 (1986) ("SERI"). In the SERI case FERC reviewed a utility's external decommissioning trust fund. FERC rejected the company's proposed trust fund and ordered that it file one that complied with FERC-established guidelines. FERC also asserted authority over the timing and amount of the utility's contributions to the fund. We note that FERC did not in the case discuss the question of what it would have

done had it been presented with a state-approved decommissioning cost plan.

In addition to FERC cases in which FERC has dealt extensively with the decommissioning issue, Maine Yankee contends that FERC has exercised its jurisdiction over Maine Yankee's decommissioning fund on several different occasions over the past nine years. Because FERC has exercised its jurisdiction over Maine Yankee's decommissioning fund in the past, Maine Yankee argues that we are now precluded from setting a decommissioning cost that in any manner conflicts or interferes with the FERC-approved rate. We take administrative notice that FERC has in the past acted with respect to Maine Yankee's decommissioning fund. *See, e.g.*, 17 FERC § 61,208 (1981); 20 FERC § 61,141 (1982); 44 FERC § 61,368 (1988). We also note, however, that a review of these orders reveals that FERC has never ruled definitively one way or another about whether it has effectively preempted all state activity in this area.

The third and final leg of Maine Yankee's "pervasive scheme" argument concerns the federal tax laws on decommissioning funding. In order to qualify for a deduction from income for federal tax purposes, utilities must comply with the provisions of section 468A of the IRC and regulations promulgated thereunder. Some of the requirements imposed by the statutory and regulatory scheme include a level funding of decommissioning reserves, that the utility obtain a schedule of ruling amount from the IRS and that the amount allowed in the schedule of ruling amount by the IRS be included in the utility's cost of service for ratemaking purposes by the regulatory body responsible for setting the utility's rates.

Maine Yankee notes that in the SERI case, FERC required the utility to develop a decommissioning plan consistent with the requirements of section 468A and also to seek to minimize the payment of taxes on contributions to the trust fund. Maine Yankee also notes that it has obtained a schedule of ruling amount from the IRS in the amount of $167,000,000 and that in a Private Letter Ruling issued January 23, 1989 the IRS stated that "[p]ayments made to the fund can qualify only to the extent that they do not exceed the decommissioning costs included in the taxpayer's cost of service for ratemaking purposes in the taxable year." Maine Yankee Exhibit 2, at 333. Based on this interrelationship between FERC policy as expressed in several of its decisions and section 468A of the IRC, Maine Yankee argues that they are "inextricably interwoven" so as to give force to its contention that a pervasive scheme of federal regulation preempts state action in this case.

In addition to its argument that a pervasive scheme of federal regulation exists which preempts inconsistent state action in this case, Maine Yankee also argues that any state action that results in a decommissioning cost inconsistent with that allowed in rates by FERC constitutes a direct conflict with the FERC rate order in Docket ER88-202 and provisions of the Federal Power Act. While this is essentially a restatement of the second leg of the "pervasive scheme" argument described above, Maine Yankee advances several additional theories which merit comment.

Maine Yankee notes, correctly, that state action will be preempted, even in the absence of a pervasive scheme, when state law actually conflicts with federal law. The

Supreme Court has unequivocally stated that a conflict will be found "when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1150-51.

Maine Yankee argues that by ordering it to pay into the decommissioning trust fund an amount greater than FERC has allowed in its rates we would be directly interfering with FERC's ratemaking authority. This would be so, argues Maine Yankee, even though the setting of decommissioning costs in this docket is not ratemaking per se, but rather is establishing a cost of service that would perhaps be incorporated into a rate at some future point in time. Maine Yankee cites numerous Supreme Court and federal circuit court decisions which establish the principle that a state law, and presumably state action, need not deal specifically with rates in order to be preempted by FERC's plenary jurisdiction over wholesale ratemaking. *See, e.g., Northern Natural Gas Co.*, 372 U.S. 84 (1963); *Commonwealth of Massachusetts D.P.U. v. FERC*, 729 F.2d 886 (1st Cir. 1984).

Maine Yankee argues that any order of this Commission which requires Maine Yankee to pay an amount into the decommissioning trust fund in excess of that allowed by FERC in its rates would interfere with three components of Maine Yankee's rates: the decommissioning cost allowance, the company's overall rate of return and the company's depreciation allowance. Maine Yankee argues that by raising the decommissioning amount we could possibly alter Maine Yankee's rate of return.

Finally, Maine Yankee contends that we would be promoting a ratemaking treatment which is inconsistent with a FERC-approved rate by ordering Maine Yankee to pay more into the decommissioning fund than it already is paying. In *Commonwealth of Massachusetts D.P.U. v. FERC*, the Massachusetts D.P.U. objected to a rate-setting practice of a utility company as embodied in a FERC-approved private utility agreement and ordered the company to seek FERC approval for a change of the practice. The First Circuit held that if the state D.P.U. wanted the practice changed it could petition FERC itself. It could not order the utility to seek the change. Maine Yankee argues that by ordering Maine Yankee to pay an amount into the decommissioning trust fund in excess of what it is currently allowed in its FERC-approved rate, we would be impermissibly interfering with that rate.

B. Staff's Position

Staff argues initially in its brief that as a matter of policy, we should not declare ourselves preempted by federal law if a rational argument can be made that we are not preempted. Staff believes that once a rational basis has been established that our actions and the statute under which we act are constitutional we should act as directed by the Legislature and leave it to the courts to tell us that we are wrong. While we believe that we have the authority and jurisdiction to declare ourselves preempted, we agree with Staff that we should decline to do so in this case for reasons set forth more fully below.

Staff's argument is relatively simple and straightforward. Staff contends that the NDFA is a valid exercise of

the state's police power that does not impermissibly intrude upon or conflict with federal statutes and regulations governing wholesale ratemaking and the regulation of nuclear power generally. Staff argues that our regulation over the costs of decommissioning is valid economic regulation over nuclear power that is similar to that sanctioned by the U.S. Supreme Court in *Pacific Gas and Electric v. Energy Resources Commission*, 461 U.S. 190 (1983). In that case, the U.S. Supreme Court interpreted the Atomic Energy Act as being limited in its scope to regulation of the radiological safety aspects of the construction and operation of nuclear power plants and leaving to the states "their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. at 205. At least for purposes of interpreting the Atomic Energy Act, under which the NRC operates, the Court stated that "the legal reality remains that Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons." Id. at 223.

Staff also takes issue with Maine Yankee's interpretation of the NRC regulations governing decommissioning. As described above, Maine Yankee reads 10 C.F.R. part 50.75 as conferring in some way upon Maine Yankee's ratemaking body, the FERC, sole authority over decommissioning costs. Staff, interpreting the same section, draws the opposite conclusion. Staff argues that because the NRC has set only minimum guidelines with respect to decommissioning costs, and because the NRC has left it to the state commissions and FERC to determine the

adequacy of site-specific plans, the NRC has not preempted the states with respect to decommissioning. Staff notes, accurately, that utilities with nuclear power plants having retail sales typically have their decommissioning costs set by their respective state regulatory commissions. Staff's arguments concerning the scope of the NRC regulations appear to be designed to weaken the first "leg" of Maine Yankee's "pervasive scheme" argument outlined above.

A key aspect of the Staff's position is its assertion that the setting of decommissioning costs is not ratemaking and hence not preempted by FERC even though the costs of implementing such a plan are reflected in rates. Staff argues that "FERC has no authority to relieve the utility of the obligation imposed by state law any more than it has authority to veto a State's tax structure or workmen's compensation law to suit its own notions of what is fair." Staff Brief in Response to Maine Yankee's Motion in Limine at 15.

Staff goes on to analyze provisions of the Federal Power Act to demonstrate that FERC does not have exclusive jurisdiction over setting the cost of service. Staff believes, based on its reading of section 824e of the Federal Power Act, that while FERC can and should factor the cost of decommissioning into the wholesale rates it establishes, it lacks exclusive control over those costs in cases where a state commission has set those costs pursuant to state law. Staff argues that the only limit upon the state's power to set decommissioning costs are the minimum NRC guidelines which affect the decommissioning costs of both wholesale and retail nuclear power plants. Staff's arguments concerning the nature of

the establishment of decommissioning costs strikes at the core of Maine Yankee's argument that provisions of the Federal Power Act and FERC's actions thereunder directly preempt state action in this area and, of course, would also cast doubt upon the second leg of Maine Yankee's "pervasive scheme" argument.

Staff also attacks the third "leg" of Maine Yankee's pervasive scheme argument concerning the effect of IRC section 468A and regulations promulgated thereunder. Staff argues that merely because FERC has in several of its decisions (e.g., the SERI case discussed above) directed utilities to follow the provisions of IRC § 468A in order to qualify for the tax benefits associated with such compliance, that in and of itself, does not result in "preemption" by the IRS. Staff points out that the existence of federal regulations determining the deductibility of decommissioning expenses in no way precludes a state from exercising its authority to impose decommissioning costs consistent with the basic NRC regulations.

In its Memorandum in Support of Motion in Limine dated November 30,1989, Staff makes several additional arguments to support its view that FERC has not directly preempted the states and that an insufficient basis exists to demonstrate a pervasive scheme. Staff cites a long line of Supreme Court decisions which stand for the general proposition that the federal courts will not void state statutory schemes absent a clear expression of preemptive intent from the Congress. *See, e.g., Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 429 (1966). Applying this general principle to the provisions of federal law at issue here, particularly provisions of the Federal Power Act, Staff concludes that Congress has manifested no

clear expression of preemptive intent with respect to the setting of decommissioning costs. Staff notes, correctly, that the Federal Power Act was originally passed to "fill the regulatory gap" left by the Supreme Court's decision in *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 373 U.S. 83 (1927). In that case the Supreme Court held essentially that regulation of interstate and wholesale rates for electricity were beyond regulation by the states due to the operation of the Commerce Clause of the United States Constitution. Staff argues, therefore, that the extent of FERC's jurisdiction must be measured by the extent of the regulatory gap left by the Commerce Clause cases such as *Attleboro* and its progeny. The federal legislation passed to "fill the gap" should be given preemptive effect "only to the extent necessary to protect the achievement of the aims" of the federal statute. Staff Memorandum at 4, quoting *Merrill Lynch v. Ware*, 414 U.S. 117, 127 (1964). Staff applies these basic principles of the law of preemption to the issue of decommissioning costs and concludes that Congress has not acted to preempt state regulation of decommissioning costs even though the setting of decommissioning costs has an effect on how FERC will set wholesale rates. Staff argues that the effect is only "incidental" to the setting of rates and therefore permissible.

Staff also argues that the balance between federal and state jurisdiction under the Supremacy Clause must be informed by the nature of the activity which is the potential subject of preemption. Staff cites as an example *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) where the Supreme Court upheld a Florida statute

against a Supremacy Clause attack. In that case the Florida legislature enacted a statute that expanded the liability of oil tankers and their owners beyond that required by federal law. The Supreme Court, in upholding the statute, placed considerable emphasis on the nature of the activity that was the subject of both state and federal regulation, in that case the pollution of coastal waters. The Court found that the state had the right to exercise its police power in an area where it had a substantial and traditional interest in protecting its citizens.

Finally, Staff cites us to numerous recently enacted statutes in the environmental and nuclear waste area that give to the states an increased regulatory role. Staff cites these statutes as support for the view that decommissioning costs are not subject to a pervasive scheme of federal regulation. These statutes include the Clean Air Act, the Safe Drinking Water Act, the Hazardous Materials Transportation Act, the Uranium Mill Tailings Act, the Powerplant and Industrial Fuel Act, the Low-level Radioactive Waste Policy Act, and the Nuclear Waste Policy Act. Staff argues that given Congress' recent inclination to place more and more responsibility on the states to handle the wastes and byproducts of nuclear power plants, it is reasonable to assume that Congress would not and has not foreclosed the states from acting with respect to the financial planning for the disposal of those wastes.

C. Office of the Public Advocate's Position

The OPA supports Maine Yankee's position on the preemption question. The OPA offers its own legal

analysis of this question which is similar to that put forward by Maine Yankee. Several additional points raised by the OPA, however, merit further discussion.

The OPA is concerned that if we act in this case in a manner inconsistent with what FERC has already done, the Commission would be embroiling the parties in litigation for the next several years at considerable cost. The OPA believes this would be a waste of resources and would likely prove fruitless in any event. The OPA argues that if we decide we are not preempted and then are reversed on appeal, a bad and potentially dangerous precedent would be set with respect to other assertions of state regulatory authority in the nuclear power field. The OPA notes specifically that recently enacted state legislation concerning "below regulatory concern" low level radioactive waste, the existing state resident inspector program at Maine Yankee and Maine's Low Level Radioactive Waste Authority Act of 1987 would all be at risk of being overturned as preempted by federal law.

D. IECG's Position

The IECG supports Maine Yankee's position on the preemption question. The IECG, like the OPA, also raises concerns about the costs involved in litigating an appeal of a decision by this Commission finding no preemption. The IECG believes resources could be more wisely spent. The IECG is also concerned about the practical effect of a decision by this Commission that conflicts with what FERC has already approved in FERC's rates. The IECG is concerned that Maine ratepayers may end up paying more into the decommissioning fund than non-Maine

ratepayers should we adopt the Staff's position or a position similar to it.

E. Analysis

All the parties agree that it is through the operation of the Supremacy Clause of the United States Constitution that federal law preempts conflicting state law. The Law Court has described the doctrine of preemption in the following terms:

> A conflict warranting preemption may be direct in that the regulation obviously contradicts federal regulation, or it may arise from congressional intent, either express or implied, to occupy a particular area . . . Preemption, however, is not a favored concept, and federal regulation will be deemed to be preemptive of state regulatory powers only if grounded in "persuasive reasons – either the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably 'so ordained.' [citation omitted]

Director of Bureau of Labor Standards v. Fort Halifax Packing Company, 510 A.2d 1054,1057-58. Furthermore, "[p]reemption analysis always starts with the presumption that Congress did not intend to displace state law." *State of California v. Federal Energy Regulatory Commission*, 877 F.2d 743, ___ (9th Cir. 1989). We add to these general principles the point raised by Staff in its Brief concerning the proper role of the Commission in passing upon the constitutionality of statutes with which we are directed by the Legislature to implement. As noted above, while we believe we have the authority to declare ourselves preempted, we should do so only under the most obvious of

circumstances since our primary role is not that of legal advisor to the Legislature, but rather, as an administrative agency charged by the Legislature with the responsibility and duty to carry out and implement the laws as enacted by that body. With these basic principles guiding us, we conclude that we are not foreclosed from approving a cost of decommissioning that is greater than the amount that is currently reflected in its FERC-approved wholesale rates.

1. Pervasive Scheme

In *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1150 the Supreme Court noted that "[i]n the absence of explicit statutory language . . . Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States . . . ." No party before us in this case argues that any federal statute explicitly grants to FERC or any other agency the exclusive authority to set decommissioning costs. We must therefore infer some intent from the overall existing scheme of regulation if we are to adopt Maine Yankee's position.

Maine Yankee points first to the NRC regulations governing decommissioning as an example of congressional intent to occupy the field. The NRC regulations, in particular 10 C.F.R. part 50.75, set minimum decommissioning standards and "are not intended to be used, by themselves, by other agencies to establish rates." *Id.* at part 50.75(a). The regulations, and comments accompanying the regulations, however, contain some discussion

about how the FERC and state regulatory bodies are to use the NRC guidelines. Part 50.75(a) states that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies . . . having jurisdiction over rate regulation." In response to comments on the Rule, the NRC states in its order issuing the final rule that

> Under the existing statutory scheme the NRC has the authority to require specific funding arrangements in order to protect public health and safety whereas the other agencies do not. NRC's rule amendments permit a State or Federal rate regulatory agency to choose from among the funding alternatives listed in the final rule and to choose levels of funding based on specific considerations related to their ratemaking responsibilities. . . .

53 Fed. Reg. 24038 (June 27, 1988). Maine Yankee concludes, based on its reading of these sections of the NRC regulations, that the *NRC* has granted to FERC the exclusive authority to set decommissioning costs for utilities under its rate jurisdiction.

In the first place, it should be obvious that the NRC cannot grant jurisdiction to a co-equal federal agency. That is the function of Congress. Nor do we read the NRC regulations as purporting to assign authority between the states and another federal agency. Rather, the NRC was disclaiming whatever ratemaking powers it may have itself and was stating that decommissioning costs and rates to fund decommissioning were matters for the proper ratemaking regulatory authority, whether state or federal. The NRC regulations are silent with respect to the role state-approved decommissioning funds are to play in the case of utilities with wholesale rates regulated

by the FERC. It is obvious that the NRC does not view state commissions to be incompetent in this area since the NRC regulations specifically provide for the possibility that state commissions would be acting with respect to the setting of decommissioning costs and rates. We conclude that the NRC regulations could not, did not intend and do not preempt our authority to establish a decommissioning cost or to pass to FERC the sole and exclusive authority to set those costs.

Maine Yankee also argues that because FERC itself has acted to set decommissioning costs for Maine Yankee and other wholesale utilities, we are foreclosed from finding or setting decommissioning costs inconsistent with the FERC-approved rate. We agree with Maine Yankee that FERC has set wholesale rates for Maine Yankee as well as other wholesale utilities and, in doing so, necessarily has determined what level of decommissioning costs it will allow in rates. We agree further that FERC has the authority to so act pursuant to section 824e of the Federal Power Act. The fact that FERC has acted, however, does not answer the question of whether we may act to determine the proper level of decommissioning costs pursuant to state law. The SERI case cited by Maine Yankee surely applies to all utilities lacking the benefit of a state-mandated and approved plan. Nowhere in the SERI decision, however, does FERC state that the setting of decommissioning costs is an exclusively federal function. Indeed, an examination of past Maine Yankee decisions at FERC indicates that FERC recognizes the legitimate role state action might have in this area.

In docket ER82-15-000 (20 FERC 61,141) (August 3, 1982), FERC approved a settlement agreement that

included a specific amount in Maine Yankee's rates to cover decommissioning costs. In its discussion of Maine Yankee's position with respect to the level of funding, the FERC order approving the settlement agreement notes:

> In reference to concerns that the level of decommissioning charges is too low, the company claims that there is no basis for concluding that the Maine Act requires a level other than that proposed *pending final Maine PUC action* on Maine Yankee's "financing plan". The settlement rates are based on tentative estimates, subject to future adjustment, and Maine Yankee would file a subsequent application with the Commission *if a higher charge is imposed by Maine law.*

Order Approving Settlement at 5 (slip op.) (emphasis added). Nothing in subsequent settlement agreements involving Maine Yankee suggests that FERC has in any way changed this early view concerning the potential state regulatory role in decommissioning financing. We disagree, therefore, with the conclusion that because FERC sets all aspects of Maine Yankee's rates, we are precluded by operation of the NRC regulations from approving a decommissioning cost amount that may differ from what FERC has allowed in rates.

Finally, we disagree with Maine Yankee that the IRC statutes and regulations governing the deductibility of decommissioning add further evidence of the pervasiveness of federal regulation over decommissioning costs. We do agree that FERC does require utilities over which it exercises jurisdiction to follow the IRC provisions in order to minimize the utility's tax burden and that IRC section 468A permits deductibility only to the extent the

amount sought has been approved by the utility's rate setting body. This interplay between FERC and the IRS, however, does not lead to the conclusion that the IRC provisions preempt state law concerning the establishment of decommissioning costs. No individual or business in the United States escapes the pervasive purview of the IRC. If being subject to federal tax law were sufficient to allow federal preemption, there would be no state government at all. The IRC provisions obviously do have some bearing on the tax treatment of contributions to the fund. We agree with Staff, however, that the IRS has no authority or responsibility to delineate the relative responsibilities of state and federal agencies over decommissioning costs.

Our analysis of the three "legs" of Maine Yankee's "pervasive scheme" argument convinces us that a pervasive scheme of federal regulation over decommissioning costs does not exist that would preempt supplementation by a state regulatory body. We are simply unable to discern a clear preemptive intent on the part of Congress with respect to this issue. In addition our analysis of the three areas of federal law discussed above, we agree with Staff that "pervasiveness" must also be measured by the nature of the activity sought to be preempted and the extent to which the state's traditional police power would be eroded by the assertion of exclusive federal control. It goes almost without saying that the decommissioning of a nuclear plant involves substances which are among the most harmful to human health. Because Maine Yankee's nuclear power plant is located in Wiscasset, Maine, the

state has a compelling interest in seeing, to its satisfaction, that the company generating those wastes has the financial capacity to dispose of them.

2. Direct Conflict

The second prong of Maine Yankee's preemption argument is that our intrusion into the area of decommissioning costs would directly conflict with FERC's ratemaking authority pursuant to section 824e of the Federal Power Act. Maine Yankee argues specifically that FERC has exclusive jurisdiction over Maine Yankee's wholesale rates and, therefore, over the setting of Maine Yankee's cost of service, an essential element of ratemaking. Because of FERC's authority over the cost of service, Maine Yankee argues that by setting a cost of decommissioning pursuant to the NDFA we would be impermissibly interfering with FERC's rate setting responsibilities. The OPA also argues that setting a cost of decommissioning pursuant to the NDFA would be the functional equivalent of directly asserting ratemaking jurisdiction over Maine Yankee's wholesale rates. The OPA points to the fact that FERC has affirmatively set Maine Yankee's cost of decommissioning several times over the past decade in rate proceedings, thereby indicating substantial interest in this field. Our analysis of this issue leads us to the conclusion that there is no direct conflict.

All parties apparently agree that by setting a cost of decommissioning we would not be establishing a rate per se. Rather, we would be establishing a cost of service which FERC would have to consider in setting a wholesale rate for Maine Yankee. In order to determine whether we may engage in such an activity, we turn to the Federal

Power Act itself and related preemption cases for guidance.

Section 824(a) declares the policy governing the federal regulation of wholesale power rates. This section notes that federal jurisdiction extends to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale." Federal jurisdiction, however, extends "only to those matters which are not subject to regulation by the States." The ratemaking provisions of the Federal Power Act therefore serve the purpose of "filling the regulatory gap" left by the *Attleboro* decision and its progeny.

Section 824e(a) sets forth the ratemaking jurisdiction of FERC. Pursuant to this section, FERC "shall determine the just and reasonable rate . . . and shall fix the same . . . ." We agree with Maine Yankee that this section empowers the FERC to determine the cost of service in order to set a just and reasonable rate. Nowhere in this section, however, is the authority to determine costs for every element of the overall cost of service described as the exclusive domain of FERC. As pointed out by Staff, this section does not even mention the word "cost." Rather, it is by implication that FERC must set costs.

In order to find no direct conflict we must examine and reconcile two Supreme Court decisions having a bearing on this matter, *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986) and *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145 (1988).

In *Nantahala*, the Supreme Court reversed a decision of the North Carolina Supreme Court that because a utility (Nantahala) had purchased an unreasonably large

quantity of high-cost power from the TVA, the North Carolina Utilities Commission did not err in refusing to pass those costs on to retail customers. Nantahala sold at both retail and wholesale. Its wholesale rates had been approved pursuant to a FERC determination concerning allocations of certain low cost "entitlement power" and high cost "purchased power" that Nantahala received. This allocation had actually been litigated at FERC. The North Carolina Supreme Court determined that although the allocation of power had been approved by FERC that alone did not answer the question of whether the North Carolina Utilities Commission was precluded from determining whether the costs resulting from that allocation should be automatically passed through to retail consumers in the form of higher rates. The U.S. Supreme Court held that the state commission was precluded from disturbing the power allocation which it apparently viewed as integral to the wholesale ratemaking process, and was therefore required to pass whatever costs were incurred as a result of that allocation on to intrastate ratepayers. Thus, although the power allocation by FERC was not wholesale ratemaking per se, its effect on rates was sufficient to trigger application of the "filed rate doctrine" which holds that "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala Power & Light v. Thornburg*, 476 U.S. at 962. The Court explicitly noted that the filed rate doctrine is not limited to rates per se, but rather, would be applicable in cases where rates were directly affected by the FERC action. *Id.* at 967.

In our view, *Nantahala* is not controlling because we are not here setting an intrastate rate in conflict with a FERC-approved rate or declining to pass through to retail customers a FERC determined interstate rate or cost of service. Rather, we are determining only what we perceive to be a reasonable cost of decommissioning pursuant to the NDFA. We are uncertain, as are all of the parties, whether FERC will include the amount we determine proper in Maine Yankee's wholesale rates. FERC has not yet spoken concerning this issue. While we concede that we cannot require FERC to include in Maine Yankee's rates the amount we set for decommissioning costs, the cost of decommissioning as established by this regulatory body is difficult to distinguish conceptually from the amount that Maine Yankee must pay in state income taxes or the rate at which Maine Yankee must pay the Department of Energy for the eventual disposal of spent nuclear fuel. These costs, of course, are routinely passed through by FERC when determining what Maine Yankee's cost of service is for federal ratemaking purposes. If FERC declines to include the amount of decommissioning costs that we have established pursuant to the NDFA, then Maine Yankee may have a claim against FERC for confiscatory ratesetting.

In *Schneidewind*, the Supreme Court went a step further than it did in *Nantahala* and found a state activity even more unrelated to the setting of rates than power allocation to impermissibly interfere with FERC's ratemaking authority. In that case, a Michigan state law directed the Michigan Public Service Commission to approve the issuance of long-term securities by transporters of natural gas in Michigan for use in Michigan. The

natural gas companies which brought the declaratory judgment action in federal district court were interstate pipelines under the rate jurisdiction of FERC and were regulated pursuant to the Natural Gas Act. The companies argued, successfully, that the Michigan Public Service Commission lacked jurisdiction over their security issuances and therefore the companies did not need to obtain the Commission's approval prior to issuing those securities. The Supreme Court held that the Michigan statute infringed in an area that is "occupied" by FERC acting pursuant to the Natural Gas Act. The Court also held that the operation of the Michigan statute gave rise to the possibility of "imminent collision" between the state statute and the Natural Gas Act.

The Supreme Court began its analysis of the preemption question by first noting that while FERC did not directly regulate the issuance of securities by means of a pre-approval process, it indirectly did so through the setting of rates, particularly the setting of a utility's capital structure. The Court also viewed FERC's authority to issue certificates of public convenience and necessity as a means of ensuring the proper financing of projects and therefore an indirect regulation over the issuance of securities. The Court also cited several other powers possessed by FERC that indirectly regulate the manner in which wholesale utilities issue securities. The Court was forthright, however, in noting that FERC was not expressly authorized to approve or disapprove the issuance of securities by natural gas companies. The question, as posited by the Court, was whether the state statute regulated an area exclusively within a federal domain. *Id.* at 1153. That domain, according to the Court, was the

domain FERC has over the regulation of rates pursuant to the Natural Gas Act. The central question before the Court, then, was whether the Michigan statute amounted to a regulation of wholesale rates. The Supreme Court concluded that it did and therefore affirmed the lower court's decision finding the statute to be preempted.

The Court analyzed the purposes to be served by the Michigan statute and concluded that the Natural Gas Act sought to serve the same purposes. This analysis was in response to Michigan's assertion that the state statute sought to protect Michigan ratepayers as well as investors against the "evils" of overcapitalization, *Id.* at 1154, and therefore, at least with respect to ratepayers, higher rates. The Court was thus unable to discern any distinct purpose to be served by the Michigan statute independent of the Natural Gas Act.

The Court noted that "every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted." *Id.* at 1155. However, the Court was emphatic in stating that the Michigan statute was "a state law whose central purpose is to regulate matters that Congress intended FERC to regulate." *Id.* The Court concluded that "while the NGA does not expressly grant FERC pre-issuance authority over the securities of natural gas companies, FERC achieves the regulatory ends of such review with regard to rates and facilities through the exercise of its express regulatory responsibilities." *Id.* at 1155-56.

The Court further bolstered its conclusion by stating, in dictum, that the state statute was preempted because, if implemented, an "imminent possibility of collision"

would exist between the state statute and the Natural Gas Act. This collision would arise, according to the Court, if the Michigan Public Service Commission ever declined to approve an issuance of securities for a project which had been approved by FERC. Collision would also arise because "any state-ordered alteration in a company's capital structure would impinge on the federal ratemaking authority." *Id.* at 1156. The Court acknowledged that while not any hypothetical collision would give rise to preemption, the "imminent possibility" in this case "further demonstrated the NGA's complete occupation of the field. . . . " *Id.*

We provide this detailed analysis of the *Schneidewind* case because we believe we must reconcile that case with the decommissioning cost situation we are presented with here. In *Schneidewind*, FERC had no explicit authority over the issuance of securities; rather authority was inferred through FERC's jurisdiction over the ratemaking process. In the case now before us, while no provision of the Federal Power Act explicitly deals with decommissioning, FERC has acted in the absence of state regulation in determining a cost of decommissioning as part of the overall cost of service that is allowed in Maine Yankee's wholesale rates. Yet in so acting, at least in 1982, FERC seemed to have left open the distinct possibility of future state action in this area.

A key aspect of the *Schneidewind* decision was the emphasis placed upon the identity of interests served by the scheme of federal regulation and the state statute. Maine Yankee, of course, argues similarly that the FERC action in this area and the implementation of the NDFA serve identical interests. We do not believe so. While

FERC has set guidelines for decommissioning in several of its decisions and has set decommissioning costs for Maine Yankee, the NDFA does not have the same goals as the ratemaking authority of FERC. Section 4351 of the NDFA sets forth a litany of findings made by the state Legislature stating the peculiarly local concerns driving the requirements imposed by the NDFA. For example, section 4351(6) states that "[t]he Legislature finds that assurance is needed that funds will be available for the cost of decommissioning which would occur if a nuclear power plant is prematurely closed." This section of the statute was obviously driven by the Legislature's knowledge of the local history concerning the public's concern over whether Maine Yankee should remain open as reflected in three referendum campaigns over the past decade.

The ultimate mission of FERC, acting pursuant to its ratemaking authority, is to set just and reasonable rates for wholesale customers. While decommissioning costs are part of those rates, they are not the driving factor and the Federal Power Act sets forth no similar findings and no similar integral scheme of handling decommissioning costs. Thus, while both FERC and the Maine Commission are statutorily authorized to set decommissioning costs and those costs are designed to pay for the same physical process in the year 2008, the thrust of the two statutory schemes is different. We therefore distinguish the situation described by the Supreme Court in *Schneidewind* where the objectives of the securities issuance statute and the Natural Gas Act were held to be identical; that is, the assurance of reasonable rates and protection of investors.

The Supreme Court in *Schneidewind* also stated that the effect of the state statute in question "directly" impinged on FERC's ratemaking authority. The Court noted that an "indirect" effect might be permissible. In our view, the NDFA and orders we may issue thereunder will have only an indirect effect on Maine Yankee's rates because FERC may or may not decide to reflect the decommissioning costs we set here in Maine Yankee's rates. It is probably entirely up to FERC whether to reflect the costs we set here in Maine Yankee's rates.

Finally, we see no "imminent possibility of collision" between our action under the NDFA and FERC's rate setting authority. As noted above, FERC is not required by either state or federal law from reflecting the amounts for decommissioning we set here in Maine Yankee's wholesale rates. We believe that as a matter of federal-state comity, however, FERC will reflect our determination in Maine Yankee's rates.

Our analysis of the *Nantahala* and *Schneidewind* cases leaves us with the conclusion that we are not preempted as a matter of law from issuing an order pursuant to the NDFA that may conflict with what is currently allowed by FERC in Maine Yankee's wholesale rates because we can find no "direct conflict" by such an action. We are reinforced in this view by FERC's previous actions with respect to Maine Yankee, particularly the language found in the 1982 FERC decision approving settlement agreement, where FERC acknowledged the potential role to be played in the future by the then unimplemented NDFA. Thus, even though FERC has previously set the cost of decommissioning and reflected those costs in rates, a valid state law is now to be implemented in an area

where FERC, pursuant to its authority under the Federal Power Act, has not implicitly or explicitly preempted the field.

Although we do not believe that we are preempted from issuing an order pursuant to the NDFA that calls for an amount to be paid into the decommissioning trust fund in excess of what is now reflected in Maine Yankee's wholesale rates, we do not believe that FERC would be required as a matter of state or federal law by our order to reflect our determination in those rates.[1] As with every actual cost a utility experiences that cost may or may not be included by the ratesetting authority in its own determination of that utility's cost of service for rate purposes.

IV. COLLATERAL ESTOPPEL; JUDICIAL ESTOPPEL

Maine Yankee has separately raised the claim that the Maine Public Utilities Commission is barred by principles of collateral estoppel from deciding this matter any differently than the FERC did, on the grounds that the matter was actually litigated before FERC and the Maine Commission participated as a party.

We do not believe that the claim of collateral estoppel presents a ground for barring action by this Commission that is independent of the parallel claim that the Commission is preempted because of federal regulation in this area. In one alternative (preemption), it is obvious that it

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[1] Nor do we believe that we have the authority to require Maine Yankee to petition FERC for an increase in its rates to reflect the increased costs we impose here. *See Commonwealth of Massachusetts D.P.U. v. FERC*, 729 F.2d 886 (1st Cir. 1984).

is simply not necessary to consider the claim of collateral estoppel. If the State of Maine and this Commission are in fact precluded from reaching a decision contrary to that of the FERC because of federal preemption, then it is not necessary even to reach the issue of collateral estoppel. In the other alternative (no preemption), the conclusion may not be as obvious but we nevertheless believe it to be correct. If the State of Maine and this Commission are not preempted from deciding these issues differently than the FERC because of federal preemption, principles of res judicata or collateral estoppel do not act independently to bar a contrary decision by this Commission. In short, we do not believe that the claim of collateral estoppel has any viability in this proceeding independent of the claim of federal preemption.

If the FERC might defer to a state decision concerning the appropriateness of a decommissioning plan, it does not seem logical that the state decision should be barred merely because the amount necessary for decommissioning and the timing of its collection were previously litigated before the FERC. The inapplicability of res judicata principles under these circumstances arises not because the FERC lacked jurisdiction in the prior proceedings.[2] Plainly, as part of its ratemaking powers, the FERC had jurisdiction over all cost of service issues, including decommissioning costs and the timing of the

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[2] Of course, even if the FERC lacked jurisdiction over these issues, res judicata principles may still apply. In some jurisdictions, including Maine, lack of subject matter jurisdiction, in the absence of a timely objection, will not prevent the application of res judicata principles. *See Standish Tel. Co. v. Saco River Tel. and Tel. Co.*, 555 A.2d 478 (Me. 1989).

collection of decommissioning revenues. The inapplicability of res judicata principles instead would arise from the fact that the State of Maine has some independent jurisdiction over the matter of decommissioning costs and timing.

We also question whether the FERC decision on this matter was ever intended to have general collateral estoppel effect. Cost of service issues are generally relitigable in subsequent rate cases in the light of changed circumstances and more recent knowledge. There is no reason to believe that decommissioning costs and timing of collection are issues that should be treated differently in this respect from other cost of service issues. If cost of service issues are not precluded from relitigation before FERC, and assuming both Maine PUC jurisdiction over decommissioning and no federal preemption, there would appear to be no good reason why the decommissioning issues could not be relitigated before this Commission or before any other entity with jurisdiction over the subject matter. *Cf.* Restatement of Judgments 2d § 28(5)(a) (need for new determination of issue because of public interest).

Maine Yankee also separately raises the claim of "judicial estoppel" in support of its position that the Maine PUC cannot decide this matter. As characterized by Maine Yankee, judicial estoppel "operates to prevent the Maine PUC from deciding this matter in a manner contrary to the position it took as a party before the FERC." Maine Yankee states as the "general rule" of judicial estoppel

> that one party may not, to the prejudice of another party, deny any position taken in a prior

> judicial proceeding between the same parties or their privies, involving the same subject matter if successfully maintained in the earlier proceeding.

This doctrine differs from res judicata, therefore, in that it is the party's action and position before the prior tribunal that allegedly gives rise to the estoppel rather than the decision of the tribunal itself.

The "position" to which Maine Yankee refers is the fact that in 1981, in response to a letter from Maine Yankee to FERC stating Maine Yankee's "intent to collect decommissioning costs pursuant to its formula rate," this Commission filed a notice of intervention with the FERC and "took the position that Maine Yankee should be directed to resubmit its October 7, 1981, letter in the form of a rate schedule." Maine Yankee Prehearing Memorandum at 38. According to that memorandum, the FERC agreed and ordered Maine Yankee to file a rate filing.[3] (It is not clear from the memorandum that Maine Yankee disagreed.)

In the first place, Maine Yankee loses sight of the fact that the Maine PUC is not now a "party" to the present proceeding.[4] In this proceeding the Commission is acting in its adjudicative capacity in a matter that it is required to adjudicate by the Legislature of the State of Maine. It

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[3] For purposes of this decision we will accept these allegations as correct.

[4] Nor did the Maine Public Utilities Commission advocacy staff, which is a party to this proceeding (5 M.R.S.A. § 9054(5)), participate as a party before the FERC. Rather, Maine PUC staff attorneys represented this Commission itself as a party in the FERC proceedings.

may be barred from this adjudication by principles of federal preemption. Absent such preemption, however, we see no reason why this Commission should not adjudicate this matter simply because of a position that we took more than eight years ago in a different capacity as a party before the FERC. In other words, we come to the same conclusion that we do concerning collateral estoppel: the doctrine of judicial estoppel has no independent applicability that is separate from federal preemption itself. If we are preempted from making a decision in this area, there is no need to even consider the claim of judicial estoppel. If we are not preempted, a prior position taken as a party in a proceeding before a federal agency cannot act to negate the directive of the Maine Legislature to this Commission to decide this matter in our adjudicative capacity.

In any event, we see no inconsistency between the two positions. As discussed above, we are of the view that indeed the revenue requirement that is needed to satisfy decommissioning costs is properly a ratemaking issue before the FERC. As decided above in this order, the State of Maine and this Commission may well not be preempted from determining what those costs should be. If that conclusion is correct, either because the FERC must defer to state authority in this matter or because it is willing to do so, then it will presumably also determine that the costs established by this Commission are part of Maine Yankee's cost of service.

For the foregoing reasons, we rule against Maine Yankee's claims of collateral estoppel and judicial estoppel.

V. COMMERCE CLAUSE

Maine Yankee argues that any Order issued by this Commission that conflicts with what FERC has approved for decommissioning costs in Maine Yankee's wholesale rates would violate the Commerce Clause of the United States Constitution. Maine Yankee posits a scenario whereby we might order it to pay an amount into the decommissioning trust fund greater than what is currently reflected in Maine Yankee's rates. If FERC were to decline to incorporate this increased amount in wholesale rates, Maine Yankee contends that it might borrow the funds required to meet the extra costs. The interest on these loans would be substantial and would, according to Maine Yankee, reduce all of the owner's earnings. Maine Yankee then suggests that the Maine PUC would allow these interest costs to be passed through to retail customers of the Maine utilities that own Maine Yankee, but that other state commissions may not be so generous. Thus, argues Maine Yankee, the out-of-state owners would be put at an economic disadvantage relative to, for example, CMP. It is this potential disparity which gives rise to Maine Yankee's Commerce Clause argument.

Aside from our view that the scenario envisioned by Maine Yankee is somewhat remote, our disposition of the preemption question disposes of Maine Yankee's Commerce Clause concerns. First, if we are ultimately preempted from even approving a plan which includes an amount for decommissioning in excess of what has been approved by FERC in wholesale rates, the Commerce Clause issue becomes moot. Second, if we are not preempted from approving a plan and if FERC does ultimately reflect the amounts we set in this Order in Maine

Yankee's wholesale rates, Commerce Clause problems disappear. We therefore do not need to address the merits of Maine Yankee's Commerce Clause argument.

VI. DISCUSSION OF THE EVIDENCE

Title 35-A M.R.S.A. section 4353(2) requires a utility to submit a decommissioning financing plan that includes a number of discrete items, including "an estimate of the cost of decommissioning the plant expressed in dollars current in the year the plan is prepared and based upon an engineering report issued any time within 3 years of the date the plan is submitted to the commission." The bulk of the evidence presented in this case centered on whether Maine Yankee's proposed cost of decommissioning, $167,000,000, was reasonable. Maine Yankee, however, submitted numerous other documents as required by section 4353(2). Because of the great disparity in the amount of attention focussed on non-cost items in Maine Yankee's filing relative to the overall estimated cost of decommissioning, we shall consider the cost issues first and discuss all other items in a separate section of this Order.

A. Cost of Decommissioning and Timing of Recovery

Pursuant to 35-A M.R.S.A. section 4353(3)(B)(1) and (6) the Commission shall approve the decommissioning financing plan if the estimated time of closing the nuclear power plant and the estimated cost of decommissioning are reasonable and if contributions to the fund are equitably spread over the useful life of the plant to the extent

feasible. Both Maine Yankee and Staff presented testimony on these issues.

1. Maine Yankee

Maine Yankee presented the testimony of Mr. Patrick S. Lydon and Mr. James F. Callahan, Jr. Mr. Lydon's prefiled testimony outlines in some detail the history of Maine Yankee's decommissioning financing efforts before both FERC and this Commission. The primary value of Mr. Lydon's testimony concerning the history of Maine Yankee's decommissioning efforts is the escalating cost picture his testimony reveals. For example, in 1982 Maine Yankee was contributing $1,826,000 annually into the fund to cover a total estimated decommissioning cost of $57.6 million. In 1985 the annual contribution into the fund increased to $4,000,000 and in 1988 the annual contribution increased to approximately $9.1 million. See Lydon Prefiled at 6.

Mr. Lydon also discusses the site-specific study submitted by Maine Yankee in this case performed for Maine Yankee by TLG Engineering. *See generally* Maine Yankee Exhibit 2, at 11-119. That study estimates the cost to decommission the plant under three different decommissioning scenarios: 1) prompt removal and dismantlement ($178,097,900), 2) Entombment with delayed dismantling ($220,922,000) and 3) Mothballing with delayed dismantling ($235,618,000). All dollar estimates are expressed in mid-1987 dollars. Consistent with the NDFA, the Company has based its estimated cost of decommissioning on the prompt removal and dismantlement method. The Company's plan, however, although based on the TLG

estimate for prompt removal and dismantlement, calls for a total decommissioning cost of only $167,000,000 with an annual contribution of $9,073,943.

Mr. Lydon reconciles these two different figures ($178,097,900 vs. $167,000,000) in several ways. First, he believes the settlement amount ($167,000,000) is a reasonable estimate standing alone, apart from the fact that it is the amount approved by FERC. Mr. Lydon believes the TLG study to be a "conservative study biased toward the upper side of the cost estimates. . . . " Lydon Prefiled at 11. Furthermore, utilizing a FERC-approved 5% inflation factor, the $167,000,000 figure equates to $188.7 million as of year-end 1989. *Id.* at 12.

The Company in its brief also attempts to reconcile the actual TLG estimate with the amount submitted as part of the decommissioning financing plan. Maine Yankee notes that other estimates were proffered in the most recent FERC proceeding and that the TLG estimate was the highest. Maine Yankee also believes that the estimate approved by FERC should be given some deference by this Commission because FERC had the benefit of independent reviews of the TLG study by other intervenors. Based on these independent reviews and estimates, Maine Yankee argues that the FERC approved amount is "objective" and is the only fully developed and supportable number in the record. Finally, Maine Yankee believes $167,000,000 to be a reasonable figure because that number will be revisited several times during the next 20 years and estimates of decommissioning costs are likely to grow more accurate.

During the cross-examination of Mr. Lydon, it became clear that the only reason he believes the $167,000,000 number should be approved by this Commission is because FERC has approved that number. The following exchange is revealing:

> Mr. Buckley: And your testimony is that should be improved-approved because that's the number FERC says we can collect in rates, isn't that right?
>
> Mr. Lydon: That's correct.
>
> Mr. Buckley: So you're not providing an independent basis today that the number that FERC says is good is, in fact, a good number. You're just saying that's FERC's number, so we have to live with it. Isn't that right?
>
> Mr. Lydon: The-in our scheme of rate regulation, that's what we're pretty much obligated to file for, I believe.

Tran. C-57. Mr. Lydon did go on to say that he thought the number submitted by Maine Yankee in this proceeding was "very close" to the TLG estimate and was therefore reasonable.

Mr. Lydon, as well as his counsel, restated this view several times during his cross-examination. Responding to questions proffered by the Commission, Mr. Healy stated the position of Maine Yankee to be that "if they had their druthers" they would prefer to be collecting the full amount recommended by the TLG study for prompt removal and dismantlement. Tran. C-51, 52, 55, 75 (redirect).

Thus, while Maine Yankee argues in its brief that the FERC approved amount is an independently reasonable

figure upon which we may base a decision to approve the Company's plan, our review of the testimony offered by Maine Yankee leaves us with the distinct impression that its Chief Financial Officer believes $178,097,900 to be a preferable number. Maine Yankee, of course, in 1988 proposed to FERC that it collect $178,097,900 over a 10-year accelerated collection period. Its proposal at that time was based on the same TLG study submitted in this case. Mr. Lydon himself, as Maine Yankee's lead witness in that FERC proceeding, presented testimony in support of that $178,097,900 figure. *See* Staff Exhibit 2.

Maine Yankee's prefiled testimony at FERC was directed as much at convincing FERC to approve an accelerated collection period as it was at approving a total collection of $178,097,900. Maine Yankee sought at FERC to collect approximately $14.5 million annually for deposit into the decommissioning fund. Maine Yankee believed the accelerated collection was necessary for several reasons: 1) there was a substantial risk that the plant would be prevented from operating for its full licensed life due to a premature shutdown precipitated by local political events, 2) estimates tend to increase greater than general inflation, 3) although power contracts provide the collection of decommissioning costs after a shutdown "it is neither good public policy nor fair from a regulatory standpoint to rely on that fact as a substitute for prudent planning," and 4) because the plant was nearly 50% through its licensed life yet only 20-25% of the funds necessary for decommissioning were currently in the fund. Tran. C-45-49, 56-59. Mr. Lydon testified that in his view the local political climate concerning nuclear power had not changed since he prefiled his testimony at FERC,

Tran. C-56, and we infer from the tenor of the rest of his testimony on this subject that he believes the other factors noted above have not changed appreciably in the two years since the FERC proceeding concluded.

While Staff's cross-examination of Mr. Lydon focused on why the $167,000,000 figure collected over 20 years was too low, the Public Advocate's cross-examination of Mr. Lydon brought out to some degree that decommissioning costs may in fact be decreasing or leveling off for a variety of reasons. For example, in response to Mr. Ward's questions concerning the evolution of low level nuclear waste facilities, Mr. Lydon indicated that the number of such facilities was likely to grow in the near future and costs were likely to become more certain. Tran. C-62. The implication of this line of questioning appears to be that as the number of facilities grow, the cost of disposal may drop. *See also* Tran. D-35-36 (Austin). Mr. Lydon also agreed with Mr. Ward's suggestion that costs may decline because 1) below regulatory concern waste may in the future not have to be disposed of in a federally licensed facility, 2) technologies may improve and 3) federal surcharges on low-level waste may not apply in the future if Maine is in full compliance with federal requirements for disposal of low-level nuclear waste.

Mr. James F. Callahan, Jr. submitted prefiled testimony concerning the accounting, financial and tax effects of our ordering Maine Yankee to pay amounts into the decommissioning trust fund in excess of amounts now required to be deposited by FERC. Mr. Callahan's testimony assumes a scenario whereby we order Maine Yankee to pay $14.5 million annually into the fund but that that amount is not fully reflected in Maine Yankee's rates.

Rather, Mr. Callahan assumes that FERC would allow only the $9.1 million annual contribution in rates, leaving a shortfall of approximately $5,000,000. Although Dr. Austin, in his prefiled surrebuttal testimony, disputes the assumption that such a shortfall would actually occur, he does not take issue with the substance of Mr. Callahan's testimony. Dr. Austin's specific disagreements with Mr. Callahan are discussed below.

Mr. Callahan notes that the Company's customers contribute their respective shares of the Annual Decommissioning Amount directly into the trust fund. A portion of the amount contributed goes into a "Qualified Trust Fund" and a portion goes into a separate "Nonqualified Trust Fund." The portion which goes into the Qualified account is deductible by the Company for federal income tax purposes pursuant to a ruling from the Internal Revenue Service. The portion which the IRS recognizes as "Qualified" is that amount which FERC allows in rates. Thus, one consequence of our ordering Maine Yankee to pay an amount greater into the fund than is currently reflected in its FERC rates would be that the difference would not be tax deductible until such time as the amount was reflected in the Company's FERC rates. See Callahan Prefiled at 4-5.

Mr. Callahan provides as exhibits to his prefiled testimony calculations that attempt to show the adverse financial impact on the Company that a failure to recover the excess $5,000,000 would cause. Mr. Callahan calculates the costs that would be borne by shareholders as well as ratepayers if the Company were forced to borrow the funds necessary to fund the "excess contributions" or

if the Company funded the excess contributions internally. See Callahan Prefiled at 7-12, Exhibits JFC-1 through JFC-5.

In his critique of Mr. Callahan's testimony, Dr. Austin notes that if Mr. Callahan's borrowing analysis were to occur, the Company would have borrowed almost $100,000,000 by the year 2008. Dr. Austin emphasizes what Mr. Callahan states in passing: that it would be virtually impossible for Maine Yankee to borrow the funds since Maine Yankee's sole asset, the plant, would become a liability by the year 2008 and its only financial asset, the decommissioning trust fund would be pledged to decommissioning. Thus, unless the sponsors somehow guaranteed the loans, the borrowings would have to be essentially unsecured, a very unlikely scenario. Dr. Austin agrees with Mr. Callahan that it would be much more desirable from a financial point of view if the amount ordered into the fund by this Commission were fully reflected in the Company's FERC approved rates.

2. Commission Staff

The Commission Staff presented the testimony of Dr. Thomas Austin. Dr. Austin pointed out that, "the only current evidence Maine Yankee provides on decommissioning costs indicates a somewhat higher cost, [than the $167 million the Company proposed] some $178 million." *See* Austin Prefiled at 3. He is, of course, referring to the TLG engineering study. Dr. Austin continues, "I have no reason to believe that Mr. LaGuardia's estimate is anything other than the most reasonable point estimate which could have been made in 1987." *Id.* at 4. The thrust

of Dr. Austin's prefiled testimony from that point on is aimed at demonstrating why it is advisable for the Commission to adopt a decommissioning financing plan which results in an annual collection amount in excess of that implied by Mr. LaGuardia's estimate.

His first argument is based on an historical analysis of the real increases in previous cost estimates. *Id.* at 3-7. Since these previous estimates (a 1980 Stone & Webster study and a 1983 LaGuardia study) have been significantly revised upward by Mr. LaGuardia's most recent study, it would be wise to expect similar upward revisions in the future. Dr. Austin offered two possible scenarios to demonstrate how this could happen. First, increasing public concern over any nuclear related activity has in the past caused related cost increases in efforts to allay public fears. This may continue with regard to decommissioning activities. *Id.* at 5-6. Second, radioactive waste disposal costs may continue to escalate due to siting difficulties resulting in higher direct costs or delays in decommissioning resulting in inflation caused cost increases. *Id.* at 6-7.

Dr. Austin then describes another scenario which would make increased annual collections desirable. This is the possibility of a premature shutdown of the facility. *Id.* at 7-9. At that point the single asset corporation would no longer own an asset capable of producing earnings. The costs of decommissioning would then come from whatever amounts had been collected in the fund, any possible applicable insurahce payments and, if still short, from the contractual commitments of its customers. In short, Dr. Austin recommends that it is better to have as much of the funds available up front as possible.

Finally, Dr. Austin points to the requirements of the NDFA to the effect that payments to the fund be spread out in an equitable manner over the life of the plant. *Id.* at 10-11. Payments up to the present time amount to about 20% of the estimated cost although the plant has expended over 40% of its life. *Id.* at 9-11. It thus makes sense to increase payments now to catch up. Furthermore, if estimated costs increase in the future according to Dr. Austin's expectations, then those increases will have to be spread among fewer years of life resulting in increasing burdens on future ratepayers.

Dr. Austin's proposed solution is to assume a future cost of decommissioning of $225 million in 1987 dollars which results in an annual contribution to the fund of $13,965,287. *Id.* at 12.

3. Office of the Public Advocate

The Public Advocate offered no testimony in this proceeding but did cross-examine all witnesses. The Public Advocate's position is that the plan as submitted by Maine Yankee is a reasonable one and that the cost estimate in particular is reasonable. The Public Advocate attempted to show, particularly through the cross-examination of Dr. Austin, that the Staff's estimate was too high and that several factors, when taken together, suggest that decommissioning costs may level off or decrease in the future. The Public Advocate also argues that because cost estimates have increased substantially over the past decade and because FERC in 1988 for the first time included a contingency factor in its approved decommissioning fund rate, it is likely that even if the

$167,000,000 is on the low side, future FERC-approved decommissioning estimates should be higher and hence adequate.

The Public Advocate accurately notes in its brief that the testimony elicited from both Mr. Lydon and Dr. Austin indicates that there is considerable uncertainty about what future decommissioning costs will look like. According to the Public Advocate, this uncertainty provides support for adopting Maine Yankee's proposed cost of decommissioning.

The first area of uncertainty is that associated with the possible deregulation of some low-level radioactive waste, thereby possibly reducing the volume of low-level waste requiring disposal at a distant dump site. Such a scenario would presumably lower the overall cost of decommissioning relative to current estimates. A second area of uncertainty noted by the Public Advocate is that associated with the burial cost estimates for the low level waste. The TLG study submitted by Maine Yankee assumes the availability in 2008 of a burial site within 300 miles of Wiscasset with costs equivalent to those in effect at the Barnwell, S.C. facility in 1987. See Maine Yankee Exhibit 2, at 44. Because the Barnwell facility will stop accepting Maine waste by January 1, 1993, Maine must make other arrangements. According to Mr. Lydon, by late 1992, Maine Yankee should have a clearer view of the actual future cost of disposal than it does now. Tran. C-61,62. Furthermore, Mr. Ward elicited an acknowledgment from Dr. Austin during cross-examination that it was at least possible that because the number of waste facilities would be increasing, the cost of disposal could theoretically decrease. Tran. D-36. The point of the Public

Advocate's argument concerning this uncertainty is that it is better to wait until at least 1992, when more information will be available, to change decommissioning estimates rather than engage in speculation now.

The Public Advocate in its Brief also brings to our attention the possibility that at least some components of the cost of decommissioning will decrease over time. These include treatment of "greater than class C waste," technological improvements in decommissioning, and the possible use of Maine Yankee as Maine's low level waste depository. The Public Advocate also argues that because Maine Yankee may operate beyond its current expected shutdown date, perhaps by as many as four years, the total annual contribution need not be as high as that suggested by Dr. Austin. See Tran.C-72,D-27.

4. Analysis

Section 4353(3)(B)(1) requires the Commission to approve the plan if the licensee has provided reasonable assurance that the estimated cost of decommissioning is reasonable. Section 4353(3)(B)(6) requires the Commission to approve the plan if the licensee has provided reasonable assurance that contributions to the fund are equitably spread over the useful life of the plant to the extent feasible. The requirement to "equitably" spread the cost over the useful life of the plant results necessarily in some annual amount that must be contributed. By examining an annual amount and the amount of time over which it is collected it is possible to determine whether the cost has been spread equitably. In addition, section 4353(4) requires the Commission, based upon the plan

submitted by the utility, to establish the cost of decommissioning and establish a schedule of monthly payments into the fund "as necessary and convenient to meet that cost of decommissioning at the time of closing." Pursuant to section 4353(4) "[f]or purposes of cost estimates, the method of decommissioning shall be the method of prompt removal and dismantlement, unless the United States Nuclear Regulatory Commission . . . requires another method." Our review and analysis of the evidence is necessarily guided by these as well as other sections of the NDFA.

Staff argues in its brief that the total estimated cost of decommissioning is relatively unimportant and that the only number with "real meaning" (Austin, Tran. D-21) is the annual amount. Dr. Austin testified that "the annual payment is the one that has a real meaning in the – our estimate today of what it will actually cost to decommission the plant twenty years down the road isn't particularly interesting . . . Something will happen based on the 14 million. Nothing particularly will happen based on the 225." Tran. D-21. While the total cost of decommissioning may be uninteresting and, as all the parties would apparently agree, somewhat speculative, the statute nevertheless requires us to approve what we believe to be a reasonable estimate of the total cost of decommissioning. Once a total cost is established we must then spread that cost as equitably as possible over the useful life of the plant. Because an annual amount is necessarily derived from the estimated total cost, we believe that the total cost is at least as important as the annual contribution although we also agree with Staff that setting the best estimate on an annual basis is important.

Staff recommends that we find $225 million to be a reasonable estimate of the total cost of decommissioning. As we discuss above, Staff's estimate is based on the TLG study and is adjusted upward to reflect various perceived upward price pressures. While Staff apparently believes the TLG study to be the best available starting point for analysis, it also unequivocally argues that it is very speculative and subject to error, apparently by as much as approximately 30%. The reasons Staff discusses for adjusting that amount upward are as follows:

- level of public concern over disposal of nuclear waste
- availability and cost of disposal sites
- possibility of premature shutdown
- possibility of extended licensing or mothballing of the plant for use as a disposal facility
- historic trend of decommissioning costs to rise faster than inflation
- possible difficulties of collecting increased costs from a single asset company if funds are inadequate
- intergenerational equity concerns

See Staff Brief at 7.

We agree with Staff that each of the enumerated items are of some concern and we have accordingly considered them in deciding upon a total decommissioning cost level. Dr. Austin recognizes, correctly we believe, that these concerns are very difficult, if not impossible to

quantify. Yet Staff has quantified these concerns in a manner that somehow sums to $14 million a year, which they believe is a prudent level of collection. We do not believe this to be a certain enough number upon which to approve a decommissioning cost estimate. Dr. Austin's concerns are necessarily speculative and it is not clear that all of the expressed concerns will result ultimately in higher decommissioning costs. For example, the uncertainty associated with the availability and cost of disposal sites may have a downward cost effect. Similarly, the possible extension of Maine Yankee's life beyond 2008 suggests that lower annual contributions, spread over more years, would cover the total cost of decommissioning in an adequate manner. The level of public concern over disposal of nuclear waste and the associated concern over a possible premature shutdown are both extremely difficult to translate into dollar amounts at this time and we are uncomfortable doing so.

Our review of the record leaves us with the impression that while costs may rise overall, at least some components of decommissioning costs, such as those attributable to improved decommissioning technologies, may in fact decrease. We are unable to accept Staff's recommendation for the estimated cost of decommissioning because it essentially amounts to a speculative number added to an already somewhat speculative site specific-based engineering study.

Maine Yankee's estimated cost of decommissioning, $167,000,000, is based primarily on the fact that that is the amount approved by FERC in its rates. Although Maine Yankee has consistently maintained that it believes $167,000,000 to be an adequate number independent of its

inclusion in its wholesale rates and in its brief maintains that we should defer to FERC not only because we are preempted but also because of the independent review it received there, we cannot, based upon a review of the record in this proceeding, agree that $167,000,000 is the amount we should approve for a total decommissioning cost estimate. All the parties to this proceeding, including Maine Yankee, believe the TLG study to be the best available study upon which to base a decommissioning cost estimate. Staff nevertheless argues that other factors, when weighed together, compel a higher number at least on a yearly basis. Maine Yankee, on the other hand, argues that factors outside the four corners of the TLG study compel a lower decommissioning cost estimate. The factors cited by Maine Yankee and supported by the Public Advocate leave us unconvinced that the most reasonable decommissioning cost estimate is $167,000,000. We are unpersuaded by the two primary arguments advanced by Maine Yankee that $167,000,000 is the most reasonable estimate: 1) that we are preempted by FERC and 2) FERC has independently reviewed the estimate and found it reasonable; therefore we should defer to that finding. Neither argument tells us why the TLG study should not be accepted as submitted, especially since Maine Yankee, in its most recent FERC proceeding, argued vigorously for the amount contained in the TLG study. *See* Staff Exhibit 2. We find that the estimated total cost of decommissioning is $178,097,900 (in mid-1987 dollars), as recommended by the TLG study. We also find that collection of that amount over the anticipated remaining useful life of the plant is reasonable financial planning at present.

The TLG study estimates the total cost of decommissioning utilizing the prompt removal and dismantlement method. As noted by the Study, "[t]hese estimates reflect the site-specific features of the Maine Yankee Station and the current costs in radioactive waste shipping and burial costs." Maine Yankee Exhibit 2, page 106. The following is a summary of the decommissioning costs using the prompt removal and dismantlement method:

Work Category	Costs (Thousands)	Percent of Total Costs
Prompt Removal/Dismantling		
Decontamination	4,249	2.98
Removal	33,383	23.43
Packaging	3,435	2.41
Shipping	3,321	2.33
Burial (off-site)	32,278	22.66
Decommissioning Staffs	45,583	31.99
Other	20,230	14.20
Total	178,098	100.00

Maine Yankee Exhibit 2, page 107.

The report notes that the total amount includes a contingency factor on all activities. The contingency amount is 25%. Maine Yankee and the Public Advocate argue that the $167,000,000 figure functionally includes a contingency factor of 17.2% and that it is only the contingency which is being reduced. While it may be true that it is only the contingency factor which is being reduced, it nevertheless appears to be reduced across the board for all activities in a very imprecise manner. Furthermore, given the possibility that at least some costs will be rising, it does not seem prudent to cut a contingency

factor specifically designed to cover unforeseen cost increases.

We believe that the $178,097,900 figure recommended by the TLG study strikes a reasonable balance between the positions advocated by Maine Yankee and the OPA on the one hand and Staff on the other. We believe rational arguments can be made that at least some costs will decrease over time, as suggested by the OPA, and some will undoubtedly increase, as suggested by Staff. We have chosen $178,097,900 as a reasonable estimated cost of decommissioning because it is the amount recommended in the TLG study and because that number, we believe, reflects at least to some degree the concerns raised by Staff that costs may increase.

The TLG study itself makes clear that estimating decommissioning costs is an evolving process subject to revision:

> As actual dismantling experience on large reactors becomes available . . . cost estimates must be modified to reflect this experience . . . It is therefore prudent that this cost estimate be reviewed periodically, and updated/revised as required.

Maine Yankee Exhibit 2, page 106. We agree that the TLG cost estimate we adopt here as the estimated cost of decommissioning should be revised and updated. The Study is now two years old and events in the nuclear industry may soon render aspects of the plan obsolete.

We are mindful of Dr. Austin's admonition that a decommissioning cost estimate should not be based solely on engineering studies but that it also be based on

lent financial planning. We agree that prudent financial planning should be a part of any cost estimate. Section 4353(2) requires only that the estimate of decommissioning costs be *based* upon an engineering report. We expect that future decommissioning studies submitted by Maine Yankee will explicitly incorporate financial planning analysis including analysis of the availability and cost of disposal sites (both low level and high level waste) and will take account of the historic trend of estimates to escalate faster than inflation. We believe these and other aspects of prudent financial planning should be an integrated part of any site-specific study.

B. Additional Aspects of the Decommissioning Plan

The NDFA provides that the Commission shall approve the decommissioning financing plan if it finds that the licensee, in the judgment of the Commission, has provided reasonable assurance that a litany of statutory criteria have been met. We have discussed above the first of those criteria, the overall cost of decommissioning. We discuss here the remaining factors as set forth in section 4353(3)(B)(1)-(9).

We note that in response to a question from the Examiner concerning whether he had any problems with the non-cost related aspects of the plan, Dr. Austin responded that he had no reason to think that they were not acceptable. Tran. D-41-42. Staff in its brief does not take issue with any aspect of the plan other than the estimated cost of decommissioning.

In its original Motion to Amend the Interim Decommissioning Financing Plan, Maine Yankee sets forth item by item the extent to which elements of the new plan supersede the interim plan. For the most part, the plan has been entirely updated. Maine Yankee notes in its Motion, however, that except as amended by its new plan, the original filing stands as approved as part of the interim plan.

1. The Estimated Time of Closing – Section 4353(3)(B)(1)

The statute provides that the Commission shall approve a decommissioning financing plan if it finds, *inter alia*, that the estimated time of closing the nuclear plant is reasonable. In support of this criteria Maine Yankee offered Maine Yankee Exhibit 2, pp. 4-10, which is the NRC amendment to Maine Yankee's facility operating license. This amendment provides, *inter alia*, that the operating license expires at midnight, October 21, 2008. Maine Yankee believes that the expiration of its license is the best objective estimated time for the closing of the nuclear power plant. According to Mr. Lydon, Maine Yankee "fully expect[s] the plant to operate until October 21, 2008." Lydon Prefiled at 9.

Although the Public Advocate elicited testimony suggesting the plant could possibly operate beyond the year 2008, *see* Tran. C-72, D-27, and Staff argues the plant could shut down prematurely, *see* Austin Prefiled at 7-10, neither party argues that 2008 is an unreasonable estimated date of closing. We find that 2008 is a reasonable

estimated time of closing and therefore approve this aspect of the decommissioning financing plan.

2. Share of Estimated Cost of Decommissioning – Section 4353(3)(B)(2)

Section 4353(3)(B)(2) requires the Commission to make a positive finding, prior to approval of a plan, that the share of the estimated cost of decommissioning for each electric utility to which a nuclear plant supplies power is reasonable. In support of this finding, Maine Yankee presented Maine Yankee Exhibit 2 at 172. This exhibit shows the yearly levelized decommissioning collection of $9,073,943 based on the total among all of Maine Yankee's customers. The charges are assessed *pro rata* based on the amount of output to which each of Maine Yankee's customers is entitled.

We find that the manner in which the costs are shared is reasonable; that is, *pro rata* based on the amount of output to which each of Maine Yankee's customers is entitled. The annual amount to be charged, of course, must be adjusted in accordance with our finding concerning the cost of decommissioning.

3. Adequacy of Principle and Income to Cover Estimated Cost of Decommissioning – Section 4353(3)(B)(3)

The NDFA requires that before the Commission can approve a decommissioning financing plan it must find that the principle and income which will accumulate in the decommissioning trust fund at the estimated time of closing the plant will be adequate to cover the estimated

cost of decommissioning plus the expenses of administering the fund. In support of this finding, Maine Yankee has submitted evidence regarding the estimated growth of the fund, both principle and income, which supports a finding that funds will be adequate at the time of closing of the plant. Maine Yankee has estimated that at the time of the closing of the plant in the year 2008 the trust fund will accumulate $461,946,000 in year end 2008 dollars. This assumption is based on an assumed inflation rate of 5% and an assumed after tax return of 6.30%. This assumption, of course, further assumes continued annual collections at the rate of $9,073,043. Maine Yankee Exhibit 2 at 143. Mr. Lydon testified that as of September 30, 1988, the assets of the qualified fund were reporting an average yield to maturity of 6.60% and the non-qualified fund has an average yield to maturity of 6.88% In addition, as a result of the 5% inflation factor, the decommissioning fund estimated amount now equates to $188.7 million as of year end 1989. Mr. Lydon further testified that today in the fund there is 20 to 25% of the total amount (i.e., $37.7 million). Trans. C-59.

We find this aspect of Maine Yankee's plan to be reasonable and would expect the fund to grow in approximately the manner suggested by Maine Yankee. Maine Yankee must, of course, substitute $178,097,900 as the total cost of decommissioning with a yearly contribution of approximately $9,793,904. This amount is calculated on the same basis as the $9,073,900 figure which Maine Yankee proposed. We believe the calculation should be updated to include the actual contributions and investment returns experienced in 1988 and 1989.

4. Judicious Investment of Funds; Licensee Established Committee – Sections 4353(3)(B)(4) and 4353(3)(E)

The Act requires the Commission to find, *inter alia*, that the provisions of the proposed form of the decommissioning trust fund will insure that the funds in the trust are judiciously invested and will adequately protect the funds until decommissioning is completed. 35-A M.R.S.A. § 4353(3)(B)(4). That same section further provides that in the event the licensee establishes its own decommissioning fund committee that the licensee-established committee will insure that the funds are judiciously invested and will adequately protect the funds until decommissioning is completed. Maine Yankee submitted several documents and other evidence which support this requirement.

First, with respect to the trust, Maine Yankee submitted the Indenture of Trust dated as of October 12, 1982, the First Supplemental Indenture, dated as of October 1, 1987, and the Maine Yankee Decommissioning Trust (Master Trust) dated as of March 14, 1988. Maine Yankee Exhibit 2 at 174-260. These documents provide for the creation of trusts to hold all decommissioning payments made to Maine Yankee and any income earned on those payments solely for the purposes of meeting decommissioning expenses. The most recent document, the Master Trust, holds in trust both the non-qualified trust fund and in addition a qualified trust fund which together comprise the Maine Yankee decommissioning trust. The trust further specifically provides that investments of trust assets may only be made as permitted by Section

468A(B)(4)(C) of the Internal Revenue Code and as provided by 35-A M.R.S.A. § 4355(3)(B). Maine Yankee Exhibit 2 at 227. Disbursements may also be made to make refunds of amounts held in the qualified trust or the non-qualified trust fund if required to do so by valid order of FERC or any other regulatory agency having jurisdiction over Maine Yankee, to pay federal income taxes due and payable with respect to income of the non-qualified trust fund, and to pay reasonable administrative expenses of the trust fund. *Id.*

The indenture of trust further specifically provides for the duties of the Decommissioning Fund Committee which duties we find are consistent with the responsibilities of the Decommissioning Fund Committee as set out in 35-A M.R.S.A. § 4354(6). Maine Yankee Exhibit 2 at 245-246.

Maine Yankee has, of course, elected to set up a licensee-established trust fund committee pursuant to section 4354. The Committee will consist of five members appointed by the Board of Maine Yankee, three of whom shall be employees or board members of Maine Yankee, two of whom shall be members of the general public having no affiliation with Maine Yankee or any of its sponsors and one additional member appointed by the Governor pursuant to section 4354(1). See Lydon Prefiled at 18. The Governor may appoint a member of the Committee after the creation of the committee has been approved by the Commission. The three proposed members of the committee that are employees or board members of Maine Yankee are, subject to Board approval: 1) Charles E. Monty, Chairman of the Board of Directors, Maine Yankee; 2) Patrick S. Lydon, Vice President of

Finance and Administration, Maine Yankee; and 3) Lee E. Maillet, Treasurer and Chief Accounting Officer, Maine Yankee. Lydon Prefiled at 18-19; Tran. C-9-11. The two proposed members of the general public are James B. Longley, Jr. and John Cancelarich. See Supplemental Prefiled of Patrick S. Lydon; Tran. C-11, D-79-80.

We find that this proposed licensee-established decommissioning fund committee will be able to carry out the responsibilities and duties set forth in section 4354(6), that the fund will be managed in accordance with the requirements of section 4355 and that it is in the public interest.

5. Withdrawal of Assets – Section 4353(3)(B)(5)

The Indenture of Trust dated March 14, 1988, creating the Maine Yankee Master Trust, specifically provides that assets held by the trustee may not be withdrawn from the trust fund without the authorization of the Decommissioning Fund Committee and the MPUC. Maine Yankee Exhibit 2 at 228-233. The only exception to this requirement is that the trustee may withdraw money from the qualified trust fund for the payment of income taxes due from the trust fund as required by federal law. Maine Yankee Exhibit 2 at 232. Under no other circumstances may assets from the fund be withdrawn without the approval of the Decommissioning Fund Committee prior to, or even during, decommissioning.

We find that Maine Yankee has provided reasonable assurance that the requirements of section 4353(3)(B)(5) will be met.

6. Contributions to the Fund: Equitably Spread Over Useful Life of Plant to Extent Feasible

35-A M.R.S.A. § 4353(3)(B)(6) provides an intergenerational equity requirement which specifically mandates "contributions to the fund are equitably spread over the useful life of the plant to the extent feasible." Maine Yankee proposes in its filing to collect $167,000,000 in equal installments over the remaining 18 years of the plant's useful life. Maine Yankee is currently contributing an annual levelized collection amount of $9,073,043 collected monthly from its customers.

Both Maine Yankee and Staff appear to agree that a reasonable way to collect the total cost of decommissioning is through levelized collection over the remaining useful life of the plant, although the parties disagree on the amount that should be collected. Levelized funding also appears to preserve the deductibility of the contributions for federal income tax purposes. *See* IRC § 468A(d). In addition, we note that section 4351(2) of the NDFA states as a finding of the Legislature that funds for decommissioning should be collected "during the remaining useful life of the plant. . . . "

We find that a levelized contribution to the fund over the anticipated remaining useful life of the plant is reasonable. Maine Yankee shall recalculate the annual and monthly levelized amount in accordance with the terms of this Order.

7. Plans and Options for Insuring Against or Otherwise Financing Any Short Fall in the Fund Resulting from A Premature Closing – Sections 4353(3)(B)(7) and (8) and 4351(6)

Prior to approval of a decommissioning financing plan the Commission must find that "the plans and options for insuring against or otherwise financing any short fall in the fund resulting from a premature closing" are adequate and reasonable. In support of this finding Maine Yankee has submitted copies of its insurance policies, Maine Yankee Exhibit 3, and copies of its contractual agreements with the sponsoring companies, Maine Yankee Exhibit 2 at 261-314. With respect to the insurance contracts Mr. Lydon testified:

> in case of accident, Maine Yankee has nuclear property insurance totalling $1.875 billion as of November 15, 1989, to cover losses due to accidents. Such funds are available to stabilize and decontaminate the plant, restore to use, or if necessary decommission the plant.

Lydon Prefiled at 17.

Maine Yankee has also provided copies of its contracts with its sponsors for the purpose of establishing the sponsors' continuing contractual obligation to pay for decommissioning. These contracts essentially provide, except in the case of an eminent domain taking, or exercise of similar right or power, that the sponsors will continue to be billed and to pay decommissioning costs on a monthly basis, irrespective of the operation of the plant. Maine Yankee Exhibit 2 at 269-291; Lydon Prefiled at 15; Tran. C-32. These contracts specifically provide that

this contractual obligation to continue to pay decommissioning costs will continue until the later of either (1) thirty days after the date on which the last financial obligation of Maine Yankee which constitutes an element of the purchase price (this includes decommissioning cost) has been extinguished by Maine Yankee; or (2) thirty days after the date on which Maine Yankee is finally relieved of any obligations under the last of any licenses which it now holds or may later be issued by the Nuclear Regulatory Commission. Maine Yankee Exhibit 2 at 291-315. The additional power contract specifically provides that if the useful service life of the plant ends prior to January 2, 2003, then the only provision of the contract which will continue to apply will be that provision governing decommissioning expenses and obligations. *Id.* We note that all of these amendments to the power contract have been approved by FERC. In the event of a premature shut down of the plant these contracts would be the basis, along with the FERC tariff, for Maine Yankee to continue to bill its customers for decommissioning costs. With respect to these contracts FERC has stated the following:

> Maine Yankee's power contracts guarantee that its customers will pay the full cost of decommissioning even if the unit shuts down prematurely (i.e., before the end of its licensed life) and provides no service from which to collect rates. Maine Yankee, therefore, has a guarantee of total recovery of decommissioning costs, without the necessity for a hearing, regardless of when its plant shuts down.

Maine Yankee Atomic Power Co., 43 F.E.R.C. ¶61,453.

As noted by both Maine Yankee and Staff, Maine Yankee's power purchase agreements concerning decommissioning do not apply when premature shutdown is due to eminent domain or the exercise of some similar right or power. See Austin Prefiled at 9; Tran. C-70. We view this uncertainty with some concern but note that section 4356 of the NDFA holds the licensee primarily responsible for decommissioning and, if the assets of the licensee are insufficient to cover the remaining cost of decommissioning after the trust fund is exhausted, the owners are held jointly and severally liable for the safe and proper decommissioning of the nuclear power plant. Section 4356 does not distinguish among the various reasons for a shutdown; rather it speaks only of responsibility for decommissioning, for whatever reason.

We find that Maine Yankee has provided reasonable assurance that its plans and options for insuring against or otherwise financing any short fall in the fund resulting from a premature closing are adequate and reasonable and that the owners are legally bound to accept their respective shares of the ultimate financial responsibility for decommissioning and the plan reflects full compliance with section 4356.[5]

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[5] We note that the exception in the power contracts concerning eminent domain or other similar exercise of right or power could be viewed as inconsistent with the express provisions of section 4356. Section 4356, of course, rests ultimate financial responsibility on the owners, jointly and severally, without reference to a reason compelling decommissioning. In our view, Maine Yankee's owners cannot by contract dispose of statutorily imposed duties. Thus, the exception in the Power Contracts may be without legal effect.

8. Periodic Review – Section 4353(3)(B)(9)

The NDFA provides that prior to approving a decommissioning financing plan the Commission must find that there is reasonable assurance that the Maine Yankee Decommissioning Financing Plan will be periodically reviewed and revised to reflect more closely the cost and available techniques for decommissioning. The Commission must further find that the update shall occur at least every five years. The actual experience of Maine Yankee and the testimony of Mr. Lydon support a positive finding on this statutory element. First, Maine Yankee has commissioned and revised its decommissioning financing cost estimates three times in the period from 1981 through the present. Lydon Prefiled at 5. In addition, Mr. Lydon testified that Maine Yankee is planning to reexamine its decommissioning cost estimate every three to five years. *Id.* at 3.

We believe that periodic review of the decommissioning financing is fundamental and essential. As all parties agree, decommissioning costs are evolving as better information becomes available and industry experience is gained. Maine Yankee's TLG Study was completed in December 1987. It appears that already, just two years after its completion, it may be becoming outdated. Furthermore, it appears that a great deal more information will be learned between now and 1992 concerning disposal costs, federal regulatory treatment of various classes of waste and thus their contribution to decommissioning costs, and decommissioning technologies. We therefore direct Maine Yankee, in order to comply with

section 4353(3)(B)(9), to submit a new site-specific decommissioning cost plan no later than January 1, 1993 for review by this Commission. The Company shall consult with Commission Staff and the Public Advocate prior to commissioning the study about the nature and scope of the study to be undertaken and who the Company proposes shall conduct the study. The Company and the entity conducting the study shall consult with Commission Staff and the Public Advocate on a regular basis during the course of its preparation concerning all assumptions, calculations and methodologies used in arriving at the decommissioning cost estimate.

VII. STIPULATION

Our disposition of this case as described above leads us to reject the stipulation filed in this case by the OPA, IECG and Maine Yankee. We believe that based on the record developed in this case, $178,097,900 is the most reasonable estimated cost of decommissioning.

VIII. CONCLUSION

We find that Maine Yankee's decommissioning financing plan has failed to meet the criteria set forth in section 4353(3)(B)(1) because the plan does not provide reasonable assurance that the estimated cost of decommissioning is reasonable. We find that all other aspects of the plan have met the criteria set forth in section 4353(3)(B) to the extent discussed above. We therefore reject the plan and order that it be modified in accordance with section 4353(3)(C). In particular, we order that the portion of the plan submitted pursuant to section

4353(3)(B)(1) concerning the cost of decommissioning be modified to reflect a total cost of decommissioning of $178,097,900 in 1987 dollars as set forth in the TLG study. The annual and monthly contributions to be paid by Maine Yankee into the fund shall be levelized over the remaining useful life of the plant.

We acknowledge that the legal issues raised by this proceeding are novel and complex and appreciate Maine Yankee's, the OPA's and IECG's concerns regarding the resources necessary to litigate those issues. We believe we are, however, compelled by state law to act in the manner specified in the NDFA. Absent an indication of clear preemptive intent on the part of Congress, we decline to ignore the mandate of the statute.

Accordingly, it is

ORDERED

1. That Maine Yankee's Motion to Amend Interim Decommissioning Financing Plan and to Approve Interim Plan as Amended as the Final Decommissioning Financing Plan filed on March 20 ,1989 is granted to the extent discussed in the body of this Order.

2. That Maine Yankee's decommissioning financing plan is rejected as submitted and modified in the manner described above in this Order. The plan shall be approved as modified.

3. That pursuant to 35-A M.R.S.A. section 4353(4), the cost of decommissioning the Maine Yankee atomic power plant is $178,097,900 in 1987 dollars. Maine Yankee shall pay into the Decommissioning Trust Fund on a

monthly basis the amounts reflected in the schedule of monthly payments described below in ordering paragraph 4.

4. That pursuant to 35-A M.R.S.A. § 4353(4), Maine Yankee shall submit, as part of a compliance filing, a schedule of monthly payments to be made into the decommissioning trust fund. The schedule shall reflect the terms of this Order and shall specifically reflect a total cost of decommissioning of $178,073,900 in mid-1987 dollars. The schedule, and all calculations made to develop that schedule, shall contain all assumptions presently incorporated in Maine Yankee Exhibit 2, page 145, updated for actual contributions and investment results in 1988 and 1989. We hereby delegate to the Director of Finance or his designee the authority to review and approve the compliance filing.

5. That the interim decommissioning financing plan approved by this Commission on August 29, 1983 is hereby terminated.

6. That pursuant to 35-A M.R.S.A. section 4353(6) Maine Yankee shall submit for review to this Commission an updated site-specific decommissioning financing plan no later than January 1, 1993. At that time this Commission shall conduct a review of Maine Yankee's Decommissioning financing plan. The review shall include all of the factors set forth in section 4353(6)(A)(1)-(5).

Dated at Augusta, Maine, this 22nd day of February, 1990.

BY ORDER OF THE COMMISSION

Charles A. Jacobs
Charles A. Jacobs
Administrative Director

A true copy.
Attest: /s/ Charles Jacobs
Charles A. Jacobs
Administrative Director

COMMISSIONERS VOTING FOR: Gordon
Harrington
Paine

APPENDIX C

Title 35-A; chapter 43
SUBCHAPTER III

DECOMMISSIONING

Section
4351. Short title; findings.
4352. Definitions.
4353. Decommissioning financing plans; physical decommissioning plan.
4354. Decommissioning fund committee.
4355. Decommissioning trust fund.
4356. Responsibility for decommissioning.
4357. Procedure, liability and penalties incorporated by reference; construction.
4358. Cost of review.
4359. Enforcement.

§ 4351. Short title; findings

This subchapter shall be known and may be cited as the "Nuclear Decommissioning Financing Act."

The Legislature has made the following findings.

1. Proper decommissioning is essential. The Legislature finds that timely proper decommissioning of any nuclear power plant beginning at the time of its closing is essential to protect public health, safety and the environment and that the cost of decommissioning will be significant.

2. Collection of funds to pay for decommissioning costs. To ensure that the customers who received the benefits of these facilities pay for these decommissioning costs, the Legislature finds that it is prudent for the State to require the licensee operating a nuclear power plant in the State to collect sufficient funds during the remaining useful life of the plant to pay for these costs.

3. **Trust fund.** The Legislature finds that the best way to ensure that the funds collected will be available when they are needed for decommissioning is to require that the funds be placed in a separate trust fund for each plant and invested by a trustee until they are needed for decommissioning.

4. **Decommissioning fund committee.** The Legislature finds that it is in the public interest to have a decommissioning fund committee responsible for the prudent management of the trust fund. That committee may be established by the licensee, with Public Utilities Commission approval, or publicly established, but in either case would be subject to the requirements of this subchapter.

5. **Taxes.** The Legislature finds that funds set aside for decommissioning protect the people of the State and thus serve an essential governmental function, that payment of taxes on these funds would be an unreasonable and inappropriate burden on the ratepayers and that the income earned by the fund should be tax exempt and payments made to the fund by the licensee should be tax deductible.

6. **Premature closing of plant.** The Legislature finds that assurance is needed that funds will be available for the cost of decommissioning which would occur if a nuclear power plant is prematurely closed.

§ 4352. Definitions

As used in this subchapter, unless the context indicates otherwise, the following terms have the following meanings.

1. **Closing.** "Closing" means the time at which a nuclear power plant ceases to generate electricity and is retired from active service.

2. **Decommissioning.** "Decommissioning" means the series of activities undertaken beginning at the time of closing of a nuclear power plant to ensure that the final disposition of the site or any radioactive components or material, but not including spent fuel, associated with the plant is accomplished safely, in compliance with all applicable state and federal laws. Decommissioning includes activities undertaken to prepare a nuclear power plant for final disposition, to monitor and maintain it after closing and to effect final disposition of any radioactive components of the nuclear power plant.

3. **Decommissioning expenses.** "Decommissioning expenses" means the following:

A. All reasonable costs and expenses of removing a nuclear power plant from service, including, without limitation, dismantling, mothballing, removing radioactive waste material except spent fuel to temporary or permanent storage sites, decontaminating, restoring and supervising the site, and any costs and expenses incurred in connection with proceedings before governmental regulatory authorities relating to the authorization to decommission the plant;

B. All costs of labor and services, including services of foremen, inspectors, supervisors, surveyors, engineers, counsel and accountants, performed in connection with the decommissioning of the plant, and all costs of materials, supplies, machinery, construction equipment and apparatus acquired for or in connection with the decommissioning of the plant. It is

understood that any amount, exclusive of proceeds of insurance, realized by a licensee as salvage on or resale of any machinery, construction equipment and apparatus, the cost of which was charged as a decommissioning expense, shall be treated as a deduction from the amounts otherwise payable on account of the cost of decommissioning of the plant; and

C. All overhead costs applicable to the plant during its decommissioning period, including, but not limited to, taxes, other than taxes on or in respect of income; licenses; excises and assessments; casualties; surety bond premiums and insurance premiums.

Without limiting the generality of this subsection, amounts expended or to be paid with respect to decommissioning a nuclear power plant shall constitute part of the decommissioning expenses if they are, or when paid will be, either properly chargeable to any account related to decommissioning of a nuclear power plant in accordance with the systems of accounts then applicable to the licensee, or properly chargeable to decommissioning of a nuclear power plant in accordance with then applicable regulations of the United States Nuclear Regulatory Commission, Federal Energy Regulatory Commission or any other regulatory agency having jurisdiction.

4. Decommissioning financing plan. "Decommissioning financing plan" means the plan approved by the commission under section 4353.

5. Decommissioning fund committee. "Decommissioning fund committee" means a committee established to have overall responsibility, as described in section 4354, for a decommissioning trust fund.

6. Decommissioning trust fund or fund. "Decommissioning trust fund" or "fund" means a trust fund set up as prescribed in sections 4353 and 4355 to hold money for the eventual purpose of paying decommissioning expenses.

7. Escrow account. "Escrow account" means an account established under commission rules to hold funds collected under an interim decommissioning financing plan promulgated under section 4353, subsection 5, until a decommissioning trust fund is established or to hold funds for other temporary purposes under this subchapter.

8. Licensee. "Licensee" means the holder of the operating permit from the United States Nuclear Regulatory Commission for a nuclear power plant.

9. Nuclear power plant or plant. "Nuclear power plant" or "plant" means a nuclear fission thermal power plant situated in this State.

10. Owner. "Owner" means any electric utility which owns any portion of a nuclear power plant, whether directly or through ownership of stock in a company which owns any portion of a nuclear power plant or through membership in a holding company which owns any portion of a nuclear power plant or through other means.

11. Premature closing. "Premature closing" means the closing of a nuclear power plant before the projected date of decommissioning, as projected in the decommissioning financing plan under section 4353.

12. Prompt removal and dismantlement. "Prompt removal and dismantlement" means to immediately remove radioactive or radioactively contaminated material down to allowable residual levels which permit release of the property for unrestricted access.

13. Trustee. "Trustee" means a bank or trust company qualified to act as a fiduciary in this State.

§ 4353. Decommissioning financing plans; physical decommissioning plan

1. Submission of plans. Decommissioning financing plans shall be submitted as follows.

A. Any licensee receiving a certificate of public convenience and necessity under section 3132 for a nuclear power plant shall submit a decommissioning financing plan for the plant to the commission not less than one year prior to beginning commercial operation of the plant.

B. Any licensee operating a nuclear power plant on July 13, 1982, shall submit a proposed decommissioning financing plan for the plant to the commission as soon as possible, but not later than September 11, 1982, or such later date as the commission may consider appropriate.

2. Content of plan. A decommissioning financing plan submitted under subsection 1 shall include:

A. An estimate of the time of closing of the nuclear power plant;

B. An estimate of the cost of decommissioning the plant expressed in dollars current in the year the plan is prepared and based upon an engineering report issued any time within 3 years of

the date the plan is submitted to the commission;

C. The share of the estimated decommissioning expenses attributed to each electric utility to which the plant supplies power;

D. Plans for periodic review and updating of the plan, including the cost of decommissioning estimated under paragraph B, consistent with subsection 6;

E. Plans for establishing as soon as possible a decommissioning trust fund adequate to pay the cost estimated under paragraph B, consistent with subsection 4 and section 4355;

F. Plans and options for insuring against or otherwise financing any shortfall in the fund resulting from a premature closing of the nuclear power plant;

G. Reasonable assurance of responsibility in the event of insufficient assets in accordance with section 4356;

H. A general description of the stages by which decommissioning is intended to be accomplished, but only at the level of detail necessary to support the cost estimate of paragraph B;

I. If the licensee intends to establish its own decommissioning fund committee, a statement of its intent to do so, together with its proposed membership and a copy of the proposed decommissioning trust and its plan for implementing the trust and establishing the committee;

J. A fully executed decommissioning financing agreement between the licensee and each owner, evidencing each owner's acceptance of its respective share of the ultimate financial responsibility for decommissioning. In satisfaction of

this requirement, the licensee may submit existing ownership agreements together with documentation from each owner of the applicability of the agreement to the case of financial responsibility for decommissioning; and

K. Any other information related to the financing of decommissioning which the commission requests.

3. **Approval of plan.** The plan shall be approved as follows.

A. The commission shall conduct a public hearing on the proposed decommissioning financing plan.

B. The commission shall approve the decommissioning financing plan if it finds that the licensee, in the judgment of the commission, has provided reasonable assurance that:

(1) The estimated time of closing of the nuclear power plant and the estimated cost of decommissioning are reasonable;

(2) The share of the estimated cost of decommissioning for each electric utility to which the plant supplies power is reasonable;

(3) The principal and income which will have accumulated in the decommissioning trust fund at the estimated time of closing the plant will be adequate to cover the estimated cost of decommissioning, plus the expenses of administering the fund;

(4) The provisions of the proposed form of the decommissioning trust fund will ensure that the funds in the trust are judiciously invested and will adequately protect the funds until decommissioning is completed and, in the event the licensee proposes to

establish its own decommissioning fund committee, that the licensee-established committee will ensure that the funds in the trust are judiciously invested and will adequately protect the funds until decommissioning is completed;

(5) The assets in the fund cannot be withdrawn unless approved by the decommissioning fund committee under section 4355, subsection 5, prior to completion of decommissioning;

(6) Contributions to the fund are equitably spread over the usefui life of the plant to the extent feasible;

(7) The plans and options for insuring against or otherwise financing any shortfall in the fund resulting from a premature closing are adequate and reasonable;

(8) The owners are legally bound to accept their respective shares of the ultimate financial responsibility for decommissioning and the plan reflects full compliance with section 4356; and

(9) The plan will periodically be reviewed and revised to reflect more closely the costs and available techniques for decommissioning. This update shall occur at least every 5 years.

C. If the commission finds that the decommissioning financing plan does not meet the criteria under paragraph B, the commission shall reject the plan and order that it be modified as the commission determines necessary to meet those criteria.

D. The commission shall take final action on the proposed decommissioning financing plan within 180 days after the filing date. The filing

date shall be the date when the commission notifies the applicant that the filing is complete. If the commission does not notify the applicant of any deficiencies in the information in the application within 60 days of receipt, the application shall be deemed complete as of the date of receipt.

E. If the licensee requested approval of a licensee-established decommissioning fund committee, the commission shall approve the plan, including the plans for implementing a licensee decommissioning fund committee and a decommissioning trust fund, with such modifications as the commission finds necessary to meet the criteria of paragraph B, but only if the commission finds that the plans will reasonably ensure that the responsibilities and duties of section 4354, subsection 6, will be carried out, that the funds will be managed in order to ensure that they will be available when needed, and that the funds will only be used for decommissioning expenses and the costs of administering the trust fund.

4. Cost of decommissioning. Based upon the plan, the commission shall establish the cost of decommissioning of any nuclear power plant located in the State and shall establish a schedule of monthly payments into the decommissioning trust fund established for that plant as necessary and convenient to meet that cost of decommissioning at the time of closing. The cost of decommissioning shall not include the cost of final disposal of spent nuclear fuel. The schedule shall be established so that contributions received by the licensee are paid to the fund as soon after receipt as practicable. For purposes of cost estimates, the method of decommissioning shall be the method of prompt removal and dismantlement,

unless the United States Nuclear Regulatory Commission or its successor requires another method. The commission shall periodically review the estimated cost of decommissioning in accordance with subsection 6 and based upon that review shall revise the schedule of monthly payments as necessary.

When establishing the cost of decommissioning under this subsection, the commission shall obtain from the licensee, for information purposes, a determination of any possible federal income tax liability related to funds collected for decommissioning purposes until a definitive final determination has been made by the Federal Government that no such liability exists. Notwithstanding any other provision of this subchapter, the licensee may collect additional funds to establish a segregated escrow account for payment of potential federal taxes, as approved by the Federal Energy Regulatory Commission. In the event that no final determination has been made by the Federal Government that no income tax liability exists related to funds collected for decommissioning, the licensee shall exercise all reasonable efforts to obtain such a determination. In no event shall the licensee pay any federal income tax liability amount from the decommissioning trust fund.

5. **Plans required for operation.** Decommissioning financing plans are required as follows.

> **A.** No licensee which receives a certificate of public convenience and necessity may commence operation of a nuclear power plant, unless it has a decommissioning financing plan approved by the commission under subsection 3.

B. The commission shall promulgate an interim decommissioning financing plan by July 13, 1982, for any licensee which does not have a decommissioning financing plan approved under subsection 3. Payments shall commence immediately under the interim decommissioning financing plan and be deposited in an escrow account. That escrow account may be invested in investments permitted for the trust fund under section 4355, subsection 3, paragraph B. When a decommissioning plan is approved and a decommissioning trust fund established, the interim plan shall terminate and the money in that escrow account shall be transferred to the fund.

6. Periodic review of plan. Decommissioning financing plans for nuclear power plants shall be reviewed as follows:

A. If the commission approves a decommissioning financing plan under subsection 3, the commission shall, at least every 5 years and annually in the 5 years preceding scheduled closing, and annually thereafter until decommissioning is completed, review the financing plan to assess its adequacy. If changed circumstances make a more frequent review desirable or if the licensee requests it, the commission may review the plan after a shorter time interval. The review shall include, but not be limited to, the following considerations:

(1) The estimated date of closing the plant;

(2) The estimated cost of decommissioning;

(3) The reasonableness of the method selected for cost estimate purposes;

(4) The size and growth rate of the decommissioning trust fund, taking into account the effect of inflation; and

(5) The adequacy of the plans for financing any shortfall required under subsection 2, paragraph F.

B. After review under paragraph A, the commission may, after public hearing, order such changes in the decommissioning financing plan as it determines necessary to make the plan comply with the criteria in subsection 3, paragraph B.

7. **Physical decommissioning plan.** At least 3 years prior to closing a nuclear power plant, the licensee shall submit a physical decommissioning plan to the Governor and the commission, with updates annually thereafter. In the event of premature closing, the plan shall be submitted as soon as possible.

The commission shall review the plan to ascertain its contents and determine under subsection 6 of the adequacy of the decommissioning fund to pay for that plan, but the commission may not duplicate the health and safety review conducted by the United States Nuclear Regulatory Commission or its successor. The licensee shall file with the physical decommissioning plan a list of all decommissioning-related permits which it must receive from agencies of the State. The licensee shall update its filing annually to indicate the progress of any permit applications which it has undertaken before agencies of the State. The Public Utilities Commission shall transmit copies of this information to all agencies on the

list of permits and shall place this information in a separate file which shall be made available for public inspection. Those agencies shall inform the commission when they issue any licenses or permits or take any other final action. No licensee may decommission a nuclear power plant unless the physical decommissioning plan has been submitted to the commission.

§ 4354. Decommissioning fund committee

1. Establishment of decommissioning fund committee by the licensee. A decommissioning fund committee may be established for a particular nuclear power plant by the licensee operating that plant within one year after July 13, 1982. Upon a finding by the commission that this licensee-established decommissioning fund committee will be able to carry out the responsibilities and duties of subsection 6, that the fund will be managed in accordance with the requirements of section 4355 and that it is in the public interest, the commission may approve establishment of the committee by the licensee. At that time, the Governor may appoint a voting representative on the licensee-established decommissioning fund committee.

2. Establishment of a public decommissioning fund committee. In the event that the licensee elects not to establish its own decommissioning fund committee, or in the event that the commission fails to approve a decommissioning fund committee proposed by the licensee, or the commission elects to terminate that committee for good cause shown, a public decommissioning fund committee shall be established consisting of 7 members, including:

A. The Treasurer of State, who shall act as chairman;

B. A member nominated by the municipal officials of any municipality containing a nuclear power plant;

C. Four members nominated by the Governor, including 2 from the financial community and 2 from the general public; and

D. One member designated by the licensee.

3. **Terms of public decommissioning fund committee members.** Initially, the members appointed by the Governor shall draw lots for terms. There shall be a one-year term, a 2-year term, a 3-year term and a 5-year term. Thereafter, their terms shall be for 5 years. The municipal representative and the licensee's representative shall be named for 5-year terms. In the event of a vacancy, an interim appointment shall be made to fill the unexpired portion of the term. The Treasurer of State shall serve while holding that office. Other members shall serve until their replacements are sworn in.

4. **Compensation.** Members of the decommissioning fund committee shall receive compensation and be reimbursed for expenses as determined reasonable by the commission. They shall be paid from the decommissioning trust fund, for which services are rendered or expenses incurred. Members of a licensee-established committee are not entitled to any compensation under this subsection.

5. **Conflict of interest.** Except for the licensee's representative and members of a licensee-established decommissioning fund committee, members of the committee

shall have no direct or substantial indirect financial interest in any nuclear power plant covered by this subchapter in any company which owns directly or indirectly any portion of a nuclear power plant covered by this subchapter or in any institution involved in managing or handling a decommissioning trust fund.

6. **Responsibilities and duties.** Whether established by the licensee or otherwise, a decommissioning fund committee is responsible for the prudent management of the decommissioning trust fund in order to assure that the principal and income which will have accumulated in the fund at the time of closing the nuclear power plant for which it was established will equal the cost established in the decommissioning financing plan approved by the commission. The specific duties of a decommissioning fund committee are to:

A. Appoint the trustee;

B. Approve selection of other financial managers, if any, by the trustee;

C. Establish investment policy;

D. Evaluate investment policy and trustee performance;

E. Establish procedures for expenditures from the fund for decommissioning and administrative expenses; and

F. Perform other duties it finds necessary to carry out its responsibilities.

7. **Report; audit.** The decommissioning fund committee shall report annually to the Governor, the Legislature and the commission on its activities and the status of the decommissioning trust fund. It shall also report to the

owners of any nuclear power plant in the State on its activities relating to that plant and on the status of the associated fund. The report shall contain a breakdown of all administrative expenses. A decommissioning fund committee shall cause an annual audit to be made of each decommissioning trust fund.

8. Separate committee for each plant. There shall be a separate decommissioning fund committee for each nuclear power plant covered by this subchapter. Members may serve on more than one decommissioning fund committee.

9. Modification. In the event and to the extent that it is necessary in order to establish the tax exempt status of payments to or income of the decommissioning trust fund, the decommissioning fund committee shall, subject to the approval of the commission, modify its structure and procedures, including if necessary changing from any licensee-established trust committee established under subsection 1 to a public trust committee established under subsection 2, provided that no such modification may be contrary to the purpose for which the trust was established under this subchapter.

§ 4355. Decommissioning trust fund

1. Trustee. The decommissioning fund committee shall select a trustee or trustees to execute the policies set by the decommissioning fund committee and manage the money within a decommissioning trust fund in order to ensure that it will be available when needed and, insofar as possible, consistent with protection of the principal, so that it may grow to keep pace with inflation or faster.

Preference may be given to financial institutions incorporated in the State if consistent with their fiduciary responsibility, but only if they meet the criteria for trustees established by the decommissioning fund committee. That committee may, by a majority vote of its entire membership, change trustees at any time. Any trustee shall be subject to the same duties and may exercise the same powers as trustees under Title 18-A, article VII, and the provisions of the decommissioning trust to the extent that they are not inconsistent with this subchapter. The trustee may appoint subsidiary financial managers, subject to approval by the decommissioning fund committee. Any fees charged by the trustee shall be subject to review by the commission.

2. **Tax exemptions.** The following tax exemptions apply to the decommissioning trust fund.

A. Payments to a decommissioning trust fund shall be considered a necessary operating expense of the licensee and shall be tax deductible for state income tax purposes. All income of the fund shall be exempt from state income taxation, as long as the fund is to be used exclusively for the purposes of decommissioning and the licensee may not use the fund for any other purpose.

B. Payments to a decommissioning trust fund are deemed to be a necessary operating expense to the licensee and exempt from federal income tax. It is the legislative intent that all income of the fund be exempt from federal income taxation.

3. **Restrictions.** The following restrictions apply to the decommissioning trust fund.

A. All funds collected by any licensee for decommissioning shall be immediately segregated from the company's assets and amounts not subject to refund or required to pay tax liabilities shall be transferred to the trustee for placement in the decommissioning trust fund established for the licensee's plant. Amounts collected for decommissioning, but subject to refund or required to pay tax liabilities, shall be deposited in a separate escrow account.

B. The assets in a decommissioning trust fund may be invested only in secure assets as follows:

(1) The bonds, notes, certificates of deposit or other obligations issued or guaranteed by the United States or by any agency or instrumentality of the United States;

(2) The bonds, notes, certificates of deposit or other obligations issued or guaranteed by any state or by any agency, instrumentality or political subdivision of any state, provided that securities are rated within the 2 highest grades by any rating service approved by the Superintendent of Banking;

(3) The bonds and other obligations of any United States corporation, provided that they are rated within the 2 highest grades by any rating service approved by the Superintendent of Banking; or

(4) Until a definitive final determination has been made by the Federal Government that the income of the fund is exempt from federal income taxation, the assets in the fund may be invested only in securities exempt from federal income taxation.

The assets in a fund shall not be invested in the securities of the owner of any nuclear power

plant. The decommissioning fund committee may impose such other restrictions as it determines necessary or desirable.

C. Except as provided in section 4354, a decommissioning trust fund shall be administered only by persons not normally involved with operations of the licensee or any owner of a nuclear power plant within the State.

D. Neither the licensee nor any other owner of any nuclear power plant in the State may receive any benefit from funds remaining in the decommissioning trust fund after completion of decommissioning.

E. All income of a fund shall be accumulated and added to the principal of the fund, except as otherwise provided in subsection 5.

F. Any indenture of trust governing the decommissioning trust fund is subject to review and approval by the commission. That indenture of trust shall contain a provision that it shall be amended as necessary to conform to any future changes in state law or rule.

4. Contributions to the fund. The trustee of a decommissioning trust fund shall bill the licensee operating the nuclear power plant for which the fund was established and the licensee shall make payments to the trustee of the fund in amounts and on a schedule determined by the commission in accordance with section 4353, subsection 4.

5. Expenditures from the fund; payments for costs of decommissioning. At the time of decommissioning, the decommissioning fund committee shall authorize the trustee to make payments as necessary from the fund to the licensee to cover actual decommissioning expenses in

accordance with the decommissioning plan authorized by the United States Nuclear Regulatory Commission or its successor. The decommissioning fund committee may not approve any withdrawal for this purpose prior to completion of decommissioning, unless the physical decommissioning plan has been received and reviewed by the commission under section 4353, subsection 7.

The decommissioning fund committee may authorize withdrawals from the fund as necessary to pay reasonable expenses for administering the fund. No other withdrawal may be made prior to the commencement of decommissioning without the approval of the commission and unless the withdrawal is for the purpose of paying reasonable expenses related to decommissioning.

6. Expenditure of money remaining after decommissioning. Upon termination of decommissioning, the commission shall conduct a final audit of the decommissioning trust fund. The commission may by rule, if the public interest requires, establish a decommissioning contingency reserve at that time. If there are assets remaining in the fund attributable to a given plant, after its decommissioning has been completed, those assets shall be returned, in proportion to their payments, to the owners and any other persons who originally made payments to the licensee for decommissioning purposes in accordance with the order or orders of any regulatory agency having jurisdiction. No portion of the remaining assets in a fund may accrue to the benefit of the licensee.

An electric utility in the State which receives remaining decommissioning funds under this subchapter shall

distribute the funds equitably, under the guidance of the commission, to its customers.

7. Commission review for licensee-established committee. Notwithstanding any other section of this subchapter, if the decommissioning fund committee is established by the company under section 4354, subsection 1, withdrawals from the fund shall be reviewed and approved by the commission. No withdrawal may be approved, except for the purpose of paying reasonable expenses related to decommissioning or to the administration of the fund.

8. Separate fund for each plant. There shall be a separate decommissioning trust fund for each nuclear power plant covered by this subchapter. The assets of these funds shall not be commingled in any way.

§ 4356. Responsibility for decommissioning

1. Decommissioning trust fund. In the first instance, the cost of decommissioning shall be paid from the decommissioning trust fund established for the plant being decommissioned.

2. Licensee responsible. If the assets of the decommissioning trust fund are insufficient to pay for the cost of decommissioning, the licensee shall be responsible for the additional cost.

3. Insufficient assets. If the assets of the licensees are insufficient to cover the remaining cost of decommissioning after the decommissioning trust fund is exhausted, the owners are jointly and severally liable for the safe and proper decommissioning of that nuclear

power plant. If, under this subsection, any in-state owner pays decommissioning expenses in excess of its ownership share in the plant, that owner shall have a cause of action to recover that excess from the other owners. The Department of the Attorney General shall assist in bringing such an action.

4. State not financially responsible; protective action. The State shall have no financial responsibility for decommissioning. If the Governor finds that, because of inadequate action by the responsible parties in carrying out decommissioning, protective action is reasonably required to protect the public health and safety, the State may undertake that action. In that case, the Department of the Attorney General shall bring action against the fund, the licensee and the owners to recover the cost of that protective action. Expenses incurred by the Department of the Attorney General in bringing that action shall be paid from the decommissioning trust fund.

5. Additional expense in rates. The commission shall include, as an allowable operating expense, in calculation of authorized rates, additional decommissioning funds actually supplied by an electric utility in the State, to the extent these are just and reasonable.

§ 4357. Procedure, liability and penalties incorporated by reference; construction

To the extent that they are not in conflict with this chapter, chapters 13 and 15 apply to this chapter. This subchapter shall be construed liberally in order to achieve the purposes stated in this chapter.

§ 4358. Cost of review

The licensee shall submit to the commission, with the initial filing or upon a subsequent formal review of a decommissioning financing plan under this subchapter, a filing fee as determined by the commission, but not to exceed $50,000, in order to assist in covering the cost of review by the commission. Within one year after establishment of a decommissioning fund under this subchapter, the licensee may recover the licensing fee from the fund. Money received from the filing fee shall be segregated, apportioned and expended by the commission for the purposes stated in this section, with a report to the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs. Any unexpended funds from the filing fee shall be transferred to the decommissioning trust fund after approval of the plan.

§ 4359. Enforcement

All provisions of this subchapter shall be enforced by the Department of the Attorney General, with the cost of enforcement paid from the decommissioning trust fund.

(2)

Supreme Court, U.S.
FILED
FEB 22 1991
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No. 90-1194

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER CO.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Judicial Court Of Maine

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

Respondent Maine Yankee Atomic Power Co. ("Respondent" or "Maine Yankee") disagrees with Petitioner's statement of the question presented and submits that the issues raised by this case are as follows:

A. Whether the Supreme Judicial Court of Maine properly found the State preempted from altering the decommissioning funding expense fixed by the Federal Energy Regulatory Commission ("FERC") for an operating nuclear utility that sells its electricity exclusively at wholesale in interstate commerce.

B. Whether the Supreme Judicial Court of Maine properly found that the future decommissioning of an operating nuclear plant that sells its electricity exclusively at wholesale in interstate commerce is a matter which has been pervasively and exclusively regulated by Congress.

C. Whether Petitioner's order challenging the exclusive jurisdiction of FERC to fix Maine Yankee's decommissioning funding expense is a collateral attack on a final, unappealed order of FERC, as prohibited by 16 U.S.C. § 825*l*(b).

II. RULE 29.1 STATEMENT

Maine Yankee has no subsidiaries. It is owned by ten investor-owned utilities, none of which owns fifty percent or more of Maine Yankee's voting stock.[1]

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[1] The utilities are Central Maine Power Company, New England Power Company, Connecticut Light and Power Company, Bangor Hydro-Electric Company, Maine Public Service Company, Public Service Company of New Hampshire, Cambridge Electric Light Company, Montaup Electric Company, Western Massachusetts Electric Company, and Central Vermont Public Service Corporation.

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No. 90-1194

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER CO.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Judicial Court Of Maine

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent provisions of the United States Constitution; the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (1989), the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* (1989), and regulations governing decommissioning promulgated thereunder by the Nuclear Regulatory Commission, 10 C.F.R. Part 50 (1990), the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* (1989) and I.R.C. § 468A (1989) are reprinted in Respondent's

Appendix ("App.") at App. 1-40. The Maine Nuclear Decommissioning Financing Act, Me. Rev. Stat. Ann. tit. 35-A ("35-A M.R.S.A."), §§ 4351-4359 (1989) is reprinted in Petitioner's Appendix ("Pet. App.") at Pet. App. 94-117.

V. STATEMENT OF THE CASE

A. Federal Oversight of Maine Yankee's Decommissioning.

Maine Yankee is a single-asset company which owns and operates a nuclear electric generating facility licensed by the Nuclear Regulatory Commission ("NRC") and located at Wiscasset, Maine. *Maine Yankee Atomic Power Co. v. Maine Pub. Util. Comm'n*, 581 A.2d 799, 800 (Me. 1990), App. 58-73. Maine Yankee is owned by ten investor-owned electric utilities ("the Sponsors") located in Maine, Massachusetts, New Hampshire, Connecticut and Vermont. *Id.* It sells to these Sponsors, at wholesale, its entire output of electricity on a basis proportional to each Sponsor's ownership of the company. *Id.*[2]

Because it is an operating, NRC-licensed nuclear utility, the decommissioning of Maine Yankee's plant is subject to NRC jurisdiction. *See* 10 C.F.R. § 50.75 (1990), App. 26-32. The NRC has promulgated comprehensive regulations for decommissioning nuclear facilities which govern, inter alia, the alternative technical methods of

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[2] Several of Maine Yankee's Sponsors have, in turn, assigned some percentage of their power entitlements to consumer-owned municipal utilities located throughout New England. *See Maine Yankee Atomic Power Co.*, 42 F.E.R.C. ¶61,307 (1988).

decommissioning, and the financing and funding for decommissioning. 53 Fed. Reg. 24018-27, 24039 (1988).

In doing so, the NRC has established minimum decommissioning funding levels as a means to assure that adequate funds are available for safe and timely decommissioning. *Id.* at 24037. The NRC has acknowledged, however, that "[f]unding for decommissioning is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation." 10 C.F.R. § 50.75(a), App. 26. It has accordingly tailored its jurisdiction to accommodate site-specific decommissioning cost variations that might be taken into account by a rate-setting agency in setting rates for a utility. Thus, the NRC regulations recognize

> that funding for decommissioning of electric utilities is also subject to the regulation of agencies having jurisdiction over rates, and that the NRC requirements are in addition to, and not substitution for other requirements, and are not intended to be used by themselves by other agencies to establish rates. Hence, NRC will not become involved in the rate regulation process as it relates to decommissioning.

53 Fed. Reg. at 24031. In a similar vein, the NRC states that " . . . issues normally outside NRC's jurisdiction such as rate of collection and whether a funding method is equitable should be considered by utilities and their ratemaking bodies." *Id.*

As an exclusively wholesale seller of electricity, Maine Yankee's rates and terms of service are subject to regulation only by FERC. 16 U.S.C. §§ 824, 824e (1989), App. 1-7. Pursuant to the Federal Power Act ("FPA"),

FERC has exclusive jurisdiction over Maine Yankee's accounting, rates of depreciation and over the establishment of the cost of service for setting rates. 16 U.S.C. §§ 824e, 825, 825a, App. 4-11. Included in Maine Yankee's FERC-set rates are cost of service, including provision for return through depreciation of the utility's investment in its plant, rate of return on investment in common equity and allowance for future expense in decommissioning. *See Maine Yankee*, 581 A.2d at 803, App. 66. These three elements of Maine Yankee's filed rate are "stated" components of the rate. *Id.* They are specifically fixed by FERC and are subject to change only with prior FERC approval after notice and opportunity for hearing pursuant to 18 C.F.R. Part 35 (1990).

FERC's authority over wholesale utilities also extends to the establishment of and regulation of collections for decommissioning trust funds. *See Systems Energy Resources, Inc.*, 37 F.E.R.C. ¶61,261 (1986). In exercising this part of its jurisdiction, FERC has enunciated general guidelines, to which the industry is held, for the operation and administration of decommissioning trust funds. *Id.* at 61,727-28.[3]

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[3] FERC requires, inter alia, that each utility request a ruling from the Internal Revenue Service ("IRS") under Internal Revenue Code ("IRC") § 468A, App. 15-20. *Id.* at 61,727. Section 468A, in turn, provides that a nuclear utility may take a current tax deduction in a "ruling amount" which is approved by the IRS and which is based on the yearly decommissioning funding level established by the utility's ratemaker as a cost of service for ratemaking purposes. Treas. Reg. § 1.468A-3(a), (g)

(Continued on following page)

In 1981, 1985 and 1988, Maine Yankee filed with FERC seeking approval of the funding of the estimated cost of decommissioning and inclusion of decommissioning expense, at levels fixed by FERC, in its wholesale rates. In all three FERC rate proceedings, Maine Yankee and the parties to the FERC proceedings, including the Maine Public Utilities Commission ("MPUC" or "Petitioner"), the Maine Public Advocate and representatives of Maine Yankee's wholesale municipal customers located outside of Maine, have participated in litigated proceedings at FERC. *See Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶61,141 (1982); *Maine Yankee Atomic Power Co.*, 31 F.E.R.C. ¶61,068 (1985); *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶61,368 (1988), App. 47-52. Each time, the issues of Maine Yankee's rate of return, decommissioning cost estimate and funding level for decommissioning expense were negotiated by the parties and fixed in binding, FERC-approved settlements. *Maine Yankee*, 581 A.2d at 801, App. 61. In the 1988 FERC rate proceeding, the parties negotiated, and FERC approved, a settlement which fixed Maine Yankee's decommissioning expense at $167,000,000 and the annual funding level at a rate of $9,073,943 per year. *Id.* at 802, App. 62-63. *See also Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶61,368, Settlement Agreement, App. 47-57. The settlement also fixed Maine Yankee's rate of return on common equity at 12.9 percent.

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(1990). Thus, in the case of a FERC-regulated utility such as Maine Yankee, the IRC provision relies, in allowing deductions, on FERC determinations setting decommissioning expense and inclusion of these amounts in rates.

Id.[4] The MPUC, a full party to the proceeding, did not object to the settlement pursuant to 18 C.F.R. § 385.602(f)(3) (1990) (thus waiving all objections thereto) and took no appeal from FERC's order approving it. *Maine Yankee*, 581 A.2d at 801, App. 61.

B. Attempted State Oversight of Maine Yankee's Decommissioning.

In 1982, Maine enacted the Nuclear Decommissioning Financing Act ("NDFA"). The purpose of the NDFA, as expressed by the Maine legislature and as confirmed by the Supreme Judicial Court of Maine, is to protect the public health and safety from the radiological hazards posed by inadequate decommissioning. *Id.* at 806, App. 72; 35-A M.R.S.A. § 4351(1), Pet. App. 94. The NDFA requires any nuclear utility operating within Maine to establish a decommissioning trust fund and to submit to the MPUC a decommissioning financing plan and technical decommissioning plan. 35-A M.R.S.A. § 4353, Pet. App. 99-107. The Act establishes criteria by which the MPUC is to review and approve these plans for the purpose of, inter alia, fixing a decommissioning cost estimate, and requires utilities to fund for decommissioning at the level necessary to reach the MPUC estimate. *Id.*

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[4] The FERC-approved settlement also included a "stay-out" provision prohibiting Maine Yankee from seeking an increase in the estimated decommissioning costs to be effective before February 16, 1991. *Maine Yankee*, 581 A.2d at 802, App. 63. This bar applied only to Maine Yankee and the other parties to the FERC proceeding may petition FERC at any time for an increase in decommissioning expense. *See* Settlement Agreement, App. 55.

On March 20, 1989, Maine Yankee moved that the MPUC approve a decommissioning financing plan which reflected the provisions of the 1988 FERC order. *Maine Yankee*, 581 A.2d at 802, App. 63. After hearing and full briefing by the parties, the MPUC, on February 22, 1990, rejected the FERC-approved decommissioning expense of $167,000,000 and substituted its own expense of $178,097,900 (the "MPUC Order"). MPUC Order, Pet. App. 75. The MPUC further ordered that Maine Yankee increase, effective March 1, 1990, its annual funding level by $719,961, for a total annual contribution of $9,793,904. *Id.*, Pet. App. 81. Correctly recognizing that it could not require a FERC-regulated utility to collect this additional charge in rates, the MPUC ordered that the additional contribution be supplied from the assets of Maine Yankee or its Sponsors.[5] MPUC Order Granting Request for Stay, App. 41-46. Thus, the effect of the MPUC Order was to require Maine Yankee to fund for decommissioning at a level higher than it could collect in its wholesale rates (especially given the "stay-out" provision in the 1988 FERC settlement)[6] or currently deduct under IRC Section

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[5] The MPUC entered its orders on the understanding that it enjoyed concurrent jurisdiction with FERC over Maine Yankee's decommissioning expense and funding levels. MPUC Order, Pet. App. 55-56. Only on appeal to the Supreme Judicial Court of Maine did Petitioner assume its present position (*See Petition* at 11-15) that FERC possesses no valid jurisdiction over Maine Yankee's decommissioning funding.

[6] The Supreme Judicial Court of Maine found that the effect of the "stay-out" provision (*see* note 4, *supra*), when combined with FERC's requirement "that decommissioning costs come from ratepayers," was to render compliance with both the MPUC Order and FERC's 1988 rate order "impossible." *Maine Yankee*, 581 A.2d at 804, App. 67.

468A, and to extract the difference between the MPUC and FERC-set funding levels from the company's assets, thereby lowering its rate of return.

Maine Yankee appealed the MPUC Order to the Supreme Judicial Court of Maine. In a unanimous decision issued on October 25, 1990, the Maine court held the MPUC Order and the NDFA preempted under the Supremacy Clause of the United States Constitution on two independent grounds. First, it found that the MPUC Order interfered impermissibly with the 1988 FERC rate order fixing Maine Yankee's decommissioning expense above NRC minimum levels. *Id.* at 803-805, App. 66-69. Second, the court found that the NDFA was directed at the regulation of nuclear health and safety concerns, and thus concluded that the combined jurisdiction of the NRC over nuclear health and safety and FERC over decommissioning funding above NRC levels completely foreclosed the State from regulating the decommissioning of Maine Yankee's plant. *Id.* at 805-806, App. 69-72. The MPUC's petition for certiorari followed.

VI. SUMMARY OF ARGUMENT

Petitioner attempts to characterize the present case as one raising significant, novel issues concerning the division of regulatory authority between the state and federal governments. To the contrary, this case calls into play only the familiar principle – repeatedly affirmed by this and other courts – that the states must respect the determinations of FERC regulating the cost of power sold at wholesale in interstate commerce or must challenge those

determinations in the appropriate federal forum. *See Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). Petitioner has disregarded this principle and has sought, in collateral state proceedings, to alter the stated components of Maine Yankee's FERC-approved filed rate. This attempted venture into exclusively federal regulatory terrain, which was held preempted in a unanimous decision by Maine's highest court, finds no support in the cases and presents no important issue of law that has not been decided by this Court.

Nor is Petitioner able to generate an important question of federal law by arguing that *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) ("Pacific Gas"), which affirmed the NRC's plenary jurisdiction over nuclear health and safety matters and nuclear plant operation, permits the State to regulate the decommissioning of an operating nuclear utility pursuant to a statute that the State's highest court found motivated by nuclear safety concerns. *Pacific Gas* recognized that NRC jurisdiction coexists with the authority of FERC and the states over wholesale and retail power sales respectively. The federal regulatory scheme reflects this allocation of authority by providing that the entire spectrum of decommissioning actions is regulated by the NRC, with the limited exception that site-specific cost variations, collection rates and rate equity considerations relating to funding continue to be subject to regulation by the ratemaking agency with jurisdiction over the particular utility's rates and terms of service. In the case of Maine Yankee, that agency is exclusively FERC.

VII. ARGUMENT

A. THE HOLDING OF THE SUPREME JUDICIAL COURT OF MAINE CREATES NO CONFLICT WITH THE DECISIONS OF THE STATE AND/OR FEDERAL COURTS AND PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

This Court has stated that it will review a case on certiorari to secure uniformity of decision between the courts and "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Petitioner is unable to cite to any judicial decision, state or federal, conflicting with the Maine court's holding that the state lacks authority to set the decommissioning funding levels of an exclusively wholesale seller of nuclear-generated power.[7] Accordingly, Petitioner is obliged to make the meritless argument that the instant case presents a legal issue of "national importance." *Petition* at 5.

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[7] Nor is Respondent aware of any such conflicting judicial decision. Indeed, the cases show remarkable consistency in their defense of the preeminent authority of FERC over the economic aspects of wholesale, interstate power sales, and of the NRC over the safety and "nuclear" aspects of energy generation. *See infra* at 16-20 (citing FERC cases), 20-23 (citing Atomic Energy Act cases). Petitioner's claim of conflict between the Maine court's decision and the holding in *Pacific Gas*, 461 U.S. 190, is first addressed by Petitioner in its argument on the merits of the Maine decision and is thus answered in a corresponding section herein. *See infra* at 20-24.

The essential shortcoming in Petitioner's argument is that it confuses the importance of adequate decommissioning with the importance of the legal question which this Court is now called upon to address. Undoubtedly, as Petitioner observes, adequate and timely decommissioning is essential to the public well-being. *See Petition* at 5-6; 53 Fed. Reg. at 24019. The holding of the Maine court serves only to promote this end, however, by enforcing the extensive federal regulation which is designed to assure that nuclear decommissioning will be adequately funded and safely and thoroughly accomplished. *See* 53 Fed. Reg. at 24019 (stating purpose of NRC amendments to assure that decommissioning will be carried out "with minimal impact on public and occupational health and safety and the environment"); *Boston Edison Co.*, 34 F.E.R.C. ¶63,023 at 65,076 (1986) (expressing FERC's commitment to ensuring adequacy of decommissioning funding levels). The federal scheme of regulation accomplishes its goal through a logical allocation of authority between the federal and state governments: The NRC sets minimum decommissioning funding levels and the ratemaking agency with jurisdiction over the utility's rates supplements those levels according to site-specific studies. 53 Fed. Reg. at 24031, 24038.[8] That funding above

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[8] The Low Level Radioactive Waste Policy Act (discussed in *Petition* at 8-9), which neither removes authority over decommissioning of exclusively wholesale power sellers from the federal government nor grants such authority to the states, has no bearing on the decision of the legal issues presented by this case. *See* 42 U.S.C. § 2021d (1990).

NRC levels can be effectively regulated only by a utility's ratemaking agency is evident from the fact that only such an agency is able to ensure the equitable collection of decommissioning expense from ratepayers in a way that will not otherwise threaten the financial integrity of the utility. In the case of a wholesale, interstate seller of power, the regulating rate agency will be FERC; for a retail, intrastate power seller, it will be the state PUC. *Id.*

This regulatory system, as structured by Congress and as interpreted by the Maine court, leaves no room for a claim of state/federal regulatory conflict. Nevertheless, Petitioner contends that a "*potential* [federal/state or multistate] conflict exists whenever ratemaking jurisdiction over a nuclear power plant is vested in agencies beyond the borders of the state where the plant is located." *Petition* at 5 n.2 (emphasis added). Two answers may be made to this contention.

First, whether or not a "potential" for conflict exists in cases involving the decommissioning of utilities whose economic activities are subject to the jurisdiction of agencies other than FERC, those cases are not before the Court.[9] *See United States v. Raines*, 362 U.S. 17, 22 (1960)

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[9] Petitioner points to the Seabrook plant located in New Hampshire as a potential breeding ground of multistate or federal/state regulatory conflict. *Petition* at 5 n.2. There has been no conflict to date, however, and even if there had, it would have no relevance here. This is so because Seabrook, unlike Maine Yankee, does not sell its power exclusively at wholesale. *See id.* Similarly, although Petitioner is able to show (*Petition* at 8) that other states have enacted legislation

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(U.S. Supreme Court will not decide constitutional question on hypothetical facts.) The present appeal involves only the decommissioning of an exclusively FERC-regulated utility,[10] and, as the state court found below, the federal law applicable to such a utility offers no plausible opportunity for federal/state regulatory conflict. *Maine Yankee*, 581 A.2d at 805, App. 71.

Second, Petitioner's claim of conflict simply begs the question of the validity of state jurisdiction over the decommissioning funding of an exclusively interstate, wholesale power seller. The sole reason for the purported conflict here is that Petitioner has interfered with exclusive federal jurisdiction by attempting to regulate the rate components of a utility that sells its power exclusively at wholesale in interstate commerce. It has done this despite the fact that FERC has fixed Maine Yankee's decommissioning funding levels as a stated rate component and despite the NRC's instruction that minimum funding levels are to be supplemented only by the agency with ratemaking jurisdiction over the particular utility. The Supreme Judicial Court of Maine has rejected Petitioner's claim of regulatory authority, however, and in asserting the supremacy of federal law has revealed the purported conflict here to be illusory.

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concerning decommissioning financing, it offers no evidence that these states have attempted, like Petitioner, to fix the decommissioning funding levels of utilities that sell their power only at wholesale in interstate commerce.

[10] Research has revealed that there are only four operating nuclear utilities other than Maine Yankee whose rates and terms of service are governed exclusively by FERC.

Thus, the instant case presents no important legal question that is likely to recur or to trouble other courts. The applicable federal law provides a clear and principled system of regulation for the decommissioning of nuclear plants whose rates are set by FERC. The system's operation is not difficult to comprehend and, indeed, tracks well-established jurisdictional lines, with states maintaining the authority to fix the supplementary decommissioning funding levels of retail sellers of electricity, and with FERC performing the same function for wholesale sellers of electricity. *See Pacific Gas*, 461 U.S. at 205-206 (reciting general rule that wholesale, interstate power sales are within exclusive federal regulation while local retail sales may be subject to state control). This is not a case in which a state agency has ventured into a jurisdictional no-man's-land to regulate a matter on legal grounds which a court of law might reasonably find defensible. It is instead the instance of a single state PUC overreaching and interfering with the filed rate of a FERC-regulated utility, a practice which the Maine court, following an unbroken line of this Court's decisions, properly forbade. *See Nantahala Power & Light Co.*, 476 U.S. at 965-67, and citations therein. Accordingly, the petition for certiorari should be denied.

B. THE SUPREME JUDICIAL COURT OF MAINE CONCLUDED CORRECTLY THAT THE MPUC ORDER AND THE NDFA ARE PREEMPTED AS APPLIED TO A UTILITY THAT SELLS ITS POWER EXCLUSIVELY AT WHOLESALE IN INTERSTATE COMMERCE.

1. The MPUC Order and NDFA, as Applied to a Utility That Sells Its Power Exclusively at Wholesale, Are Preempted by the FPA.

In a unanimous decision, the Supreme Judicial Court of Maine held the MPUC Order and NDFA preempted as applied to Maine Yankee on the grounds that the Maine Act interfered impermissibly with FERC's jurisdiction over wholesale utilities' rates and services. *Maine Yankee*, 581 A.2d at 805, App. 69. That ruling is strictly consonant with the principles of applicable law, and requires neither correction nor review by this Court.[11]

As recognized by the state court, the source of FERC jurisdiction over a utility's decommissioning expense is its statutory authority over the depreciation expense, terms and conditions of service, and sales rates of wholesale, interstate sellers of electricity. *Id.* at 803-04, App. 66-67.[12] The FPA

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[11] In addition, Petitioner's challenge to this aspect of the Maine court's decision is premised on a belated denial of FERC's jurisdiction to enter the 1988 rate order. *See Petition* at 12-13. It thus constitutes an impermissible collateral attack on the FERC order. *See infra* at 25-28.

[12] As stated, *supra*, Petitioner issued the MPUC Order under the impression that, while FERC possessed jurisdiction over Maine Yankee's decommissioning funding levels, the

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grants FERC jurisdiction over rates and terms of service for " 'the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce' ". *Id.* at 803, App. 66 (*quoting* 53 Fed. Reg. at 24037-38). In addition, the Federal Power Act provides that FERC shall fix certain of the costs of production incurred by a utility in providing the service for which the rates are being set (16 U.S.C. § 824e, App. 4-7) and shall possess authority to set the rates of depreciation of the property of utilities within its jurisdiction (16 U.S.C. § 825a, App. 10-11). Decommissioning expense is a substantial cost of service which, as a form of depreciation, is amortized and collected from ratepayers at FERC-fixed levels over the useful life of the plant, and which has thus been properly categorized as a stated rate component within FERC's exclusive control. *Maine Yankee*, 581 A.2d at 803-804, App. 66-67.[13] In Maine Yankee's case, FERC has acted to

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State possessed "independent" jurisdiction over the same subject. It is, however, "common ground" that concurrent jurisdiction is an impossibility under the FPA. *Mississippi Power & Light Co.*, 487 U.S. at 377 (Scalia, J., concurring). *See also California v. FERC*, 110 S. Ct. 2024, 2031 (1990) (FPA does not provide for system of futile duplication of two authorities over the same subject matter); *Public Util. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) (citing cases supporting proposition that where FERC jurisdiction applies, it is exclusive).

[13] FERC originally characterized decommissioning expense as depreciation and treated it accordingly for accounting purposes. *Middle South Services, Inc.*, 33 F.E.R.C. ¶61,094 at 61,198 (1985). In more recent years, and out of a growing

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approve a particular decommissioning funding level as a fixed component of the company's wholesale rate schedule. *See id.* at 802, App. 62.

Because decommissioning expense is a stated component of Maine Yankee's utility rate, the State may not alter that fixed expense without violating the "filed rate doctrine." As the Maine court summarized:

> Under the "filed rate doctrine" developed under federal law, a federally regulated utility is precluded from collecting any rate other than that on file with the Commission, and the MPUC cannot interfere with the rate set by FERC or the components that go into it.

Id. at 804, App. 67.

The filed rate doctrine was first enunciated, and has been repeatedly affirmed, in the decisions of this Court. *See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981).[14] This Court has recognized that the doctrine not only governs the rate which may be charged or received for wholesale electrical

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concern for the magnitude of the costs involved, FERC has isolated decommissioning expense as a rate component separate from other depreciation and has required that it be separately stated, collected and maintained. *Boston Edison Co.*, 52 F.E.R.C. ¶61,010 at 61,074-77 (1990).

[14] The Court has stated that the provisions of the FPA and Natural Gas Act are in all material respects substantially similar. *Arkansas-Louisiana Gas Co.*, 453 U.S. at 577 n.7. Accordingly, no distinction is made herein between cases arising under one or the other of the two acts.

power, but protects the economic determinations made by FERC in the context of rate regulation from being denied full effect by the states. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (striking down state law regulating financing decisions already considered by FERC in the exercise of its authority over gas rates and facilities); *Nantahala Power & Light Co.*, 476 U.S. 953 (requiring state to accept FERC-approved wholesale power allocations); *Mississippi Power & Light Co.*, 487 U.S. 354 (rejecting state challenge to validity of FERC-approved cost allocations).

State and lower federal courts have joined this Court in enforcing FERC's plenary authority and have ruled that the states must recognize FERC rate determinations as final and binding and may impose no obligations on a utility that frustrate the objectives of FERC regulation.[15]

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[15] *See, e.g., Public Utilities Comm'n of State of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) (rejecting state claim of concurrent jurisdiction with FERC over portions of gas pipeline); *National Fuel Gas Supply Corp. v. Public Serv. Comm'n*, 894 F.2d 571 (2nd Cir.), *cert. denied*, 110 S. Ct. 3240 (1990) (state may not undermine FERC determinations through duplicative or inconsistent regulation); *Kentucky-West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988) (state must recognize FERC-approved costs of service as a valid operating expense for retail rate-making purposes); *accord Arkansas Power & Light Co. v. Missouri Public Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987); *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898 (4th Cir. 1987) (rejecting state challenge to FERC-approved wholesale power cost allocation agreement); *Northern States Power Co. v. Minnesota Pub. Util. Comm'n of W. Va.*, 344 N.W.2d 374 (Minn.), *cert. denied*, 467 U.S.

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The ruling of the Maine court is in perfect agreement with these cases. By attempting to fix Maine Yankee's decommissioning expense, the MPUC sought to alter a "cost of service component that contributes to the establishment of Maine Yankee's utility rate." *Maine Yankee*, 581 A.2d at 804, App. 66-67.[16] By requiring the additional decommissioning funding to come from the assets of Maine Yankee's Sponsors, the MPUC impermissibly mandated a reduction in another of Maine Yankee's filed rate components, its rate of return, and thereby threatened to weaken the financial base of a utility whose fiscal soundness FERC's regulation is intended to protect. *Id.* This attempted frustration of "Congress' desire to give FERC

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1256 (1984) (state must recognize FERC-approved costs of service as valid operating expense for retail rate-making purposes); *accord Spence v. Smythe*, 686 P.2d 597 (Wyo. 1984); *Public Serv. Co. of Colo. v. Public Util. Comm'n*, 644 P.2d 933 (Colo. 1982); *Narragansett Elec. Co. v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978).

[16] Petitioner's argument that its attempted alteration of Maine Yankee's decommissioning expense is merely the imposition of a cost or tax upon a utility was addressed by the Maine court and found to be without merit. *Maine Yankee*, 581 A.2d at 804, App. 68-69. The impact of the decommissioning financing plan imposed by the MPUC, the court found, could not validly be compared to the impact of a state tax. *Id.* "State taxes," it wrote, "are not set by the federal government while Maine Yankee's decommissioning expenses are and have been set by FERC." *Id.*, App. 69. In addition, the Maine court found the NDFA to be directed at regulation of nuclear health and safety matters; a binding characterization which is plainly at odds with Petitioner's comparison of the MPUC Order to a tax.

plenary authority over interstate wholesale rates" is intolerable under the FPA. *See Nantahala Power & Light Co.*, 476 U.S. at 966. The Maine court rightly invalidated the MPUC Order, therefore, and its decision need not be reviewed by this Court.

2. The Supreme Judicial Court of Maine Correctly Applied This Court's Holding in *Pacific Gas*.

Petitioner claims that the Maine court's decision striking down the NDFA unduly restricts the states' power over the "economics" of decommissioning and so stands in conflict with the ruling in *Pacific Gas*, 461 U.S. 190. *Petition* at 15-18. Neither the Maine court's binding interpretation of the NDFA nor this Court's pronouncements respecting the limited jurisdiction of the states over nuclear utilities, however, lend any support to Petitioner's arguments.

In *Pacific Gas*, the Court stated the rule that the federal government "maintains complete control of the safety and 'nuclear' aspects of energy generation." *Pacific Gas*, 461 U.S. at 212. In the absence of an express and specific federal concession of power over the subject, therefore, the states are entirely excluded from regulating within the "field of nuclear safety concerns." *Id.* The NDFA, which is expressly directed at protecting the "public health, safety and the environment," was construed by the Supreme Judicial Court of Maine to be nuclear health and safety regulation. *Maine Yankee*, 581 A.2d at 806, App. 72. The Maine court therefore held the NDFA preempted on the grounds that " 'the object sought to be obtained' " by the state law " 'and the

character of obligations imposed by it' " revealed the same purpose as those sought by federal law. *Id.* (quoting *Schneidewind*, 485 U.S. at 300).[17]

This Court has stated that it will be bound by the construction given a state statute by the state's highest court "as though the meaning as fixed by the court had been expressed in the statute itself in specific words." *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933). *See also New York v. Ferber*, 458 U.S. 747, 769 n. 24 (1982) (state court construction of state statute is binding on U.S. Supreme Court); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("it is not our function to construe a state statute contrary to the construction given it by the highest court of a state.") Here, Maine's highest court has found that the NDFA accomplishes what the Maine legislature expressly intended: The regulation of nuclear health and safety concerns. Accordingly, this Court is bound to reject Petitioner's claim that the NDFA is "economic" regulation which survives preemption under *Pacific Gas*.

Moreover, the only state regulatory authority recognized by *Pacific Gas* with respect to nuclear utilities lies in areas other than that which Petitioner now seeks to invade. *Pacific Gas* identified two such areas of state

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[17] This holding is, moreover, well supported by the applicable law. *Compare, e.g.*, 35-A M.R.S.A. § 4353(3)(B)(3), Pet. App. 101 (requiring that licensee provide reasonable assurance of adequacy of funds for decommissioning) *with* 10 C.F.R. § 50.75(b), App. 26 (same); 35-A M.R.S.A. § 4353(7), Pet. App. 106 (providing for review and updating of decommissioning financing plan) *with* 10 C.F.R. § 50.75(f), App. 30-31 (same); 35-A M.R.S.A. § 4355, Pet. App. 110-15 (providing for establishment of external decommissioning trust funds) *with* 10 C.F.R. § 50.75(e) (3), App. 30 (same).

authority: The first of these is the "planning for new power plants." *Id.* at 209. This includes determinations as to the "need for new power facilities," the "economic feasibility," "cost" and "reliability" of a particular power source, "land use" and "related state concerns." *Id.* at 205, 207, 208, 212. Thus, as Justice Blackmun remarked, the "threshold determination of whether to permit the construction of new nuclear plants" is for the state to make. *Id.* at 225-26 (Blackmun, J., concurring).[18] Conversely, the construction and operation of nuclear power plants and nuclear health and safety regulation are matters of exclusively federal concern. *Id. See also State ex rel. Util. Consumers Council v. Public Serv. Comm'n*, 562 S.W.2d 688, 698 (Mo.), *cert. denied*, 439 U.S. 866 (1978) ("the federal government regulates how nuclear plants will be constructed and maintained, the [s]tate . . . regulates *whether* they will be constructed") (emphasis in original); Note, *Preemption and Regulatory Efficiency in Federal Energy Statutes*, 103 Harv. L. Rev. 1306, 1322 (1990) (Atomic Energy Act designated two administrative spheres: "federal regulation of safety and state regulation of economic necessity, land use and rates").

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[18] When the Court notes that "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons," (*id.* at 223), therefore, the authority to which it apparently refers is the state's ability to answer in the negative "the economic question whether a particular plant should be built." *See id.* at 207. Whether the state can validly make this preconstruction economic determination was the precise issue decided by the *Pacific Gas* Court. *Id.* at 212 ("[a]t the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear power plant.")

The second area remaining within state control is that pertaining to the rates and terms of service of utilities selling their power at retail. *Id.* at 205, 208, 209, 212. For wholesale, interstate power sellers, however, this aspect of power regulation, as well as the need for power transmitted in interstate commerce, is subject only to the "broad authority" of FERC. *Id.* at 206.

The NDFA is not concerned with preconstruction issues such as the need for new power plants and, even if aimed at retail rate regulation, could have no valid application to Maine Yankee, a solely wholesale utility. Thus, the NDFA is not permissible state economic regulation as contemplated or as described by this Court in *Pacific Gas*. Rather, the Maine statute, which purports to regulate the decommissioning of an operating nuclear plant, falls squarely within the bounds of exclusive and preemptive federal jurisdiction. *See id.* at 209. *See also Long Island Lighting Co. v. County of Suffolk*, 628 F. Supp. 654, 666 (E.D.N.Y. 1986) (distinguishing, pursuant to *Pacific Gas*, valid preconstruction regulation of nuclear utilities by states and localities from invalid post-construction regulation thereof); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1232 (D.R.I. 1982) (statute requiring nuclear fuel processing company to post bond for duration of twenty years to cover costs expended by state to decontaminate areas surrounding retired processing facilities held preempted by Atomic Energy Act).

Respondent's contentions notwithstanding, then, the Maine court's ruling is entirely consistent with *Pacific Gas* and with the existing federal regulatory regime. *Pacific Gas* held that the NRC possesses plenary jurisdiction over nuclear plant construction and operation and all nuclear

health and safety matters, while FERC and the states maintain exclusive authority over wholesale and retail ratemaking respectively. *Pacific Gas*, 461 U.S. at 205-06. *See also* 42 U.S.C. § 2021(c), App. 39 (establishing NRC jurisdiction over nuclear plant construction and operation); 42 U.S.C. § 2019, App. 37 (NRC jurisdiction under Atomic Energy Act coexists with FERC jurisdiction over the wholesale, interstate power sales of nuclear utilities). The federal regulation of decommissioning reflects this distribution of authority, with the NRC establishing, inter alia, minimum funding levels and guidelines for planning and accomplishing decommissioning and with FERC or the states supplementing the NRC levels with funds collected through rates within their respective rate jurisdictions. The lower court's ruling honors this jurisdictional arrangement and requires no correction by this Court.

3. The Decommissioning of an Exclusively Wholesale Seller of Power is Subject to a Pervasive and Exclusive Scheme of Federal Regulation.

In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, this Court invalidated a Michigan law that concerned a matter not explicitly considered by FERC, namely the issuance of long term securities, because the law affected the federally-occupied field of wholesale ratemaking. The absence of express federal regulation of the subject was held to be no obstacle to preemption where an "imminent possibility" of collision existed between the state and federal law. *Schneidewind*, 485 U.S. at 310.

In the present case, the Maine court construed the NDFA as imposing on Maine Yankee obligations of the same character and purpose as the NRC's safety regulations. *Maine Yankee*, 581 A.2d at 806, App. 72. It further recognized that the only aspect of Maine Yankee's decommissioning that was left open to regulation was the funding, above the NRC's minimum levels, for decommissioning through rates; a function which, in Maine Yankee's case, had been and could be performed only by FERC. *Id.* at 805, App. 71. Under these circumstances, combined with the additional fact of the MPUC Order's *actual* interference with FERC regulation, the Maine court properly found the State foreclosed from regulation of Maine Yankee's decommissioning. *See National Fuel Gas Supply Corp.*, 894 F.2d at 579 (under *Schneidewind*, direct consideration of a particular matter by FERC is "more than enough to preempt state regulation").

C. PETITIONER CANNOT CHALLENGE FERC JURISDICTION IN THIS PROCEEDING.

In its application for certiorari, Petitioner calls into question both the jurisdiction of FERC to fix Maine Yankee's decommissioning funding levels and the validity of FERC's classification of decommissioning expense as a stated rate. *Petition* at 12-13. Petitioner's challenges are baseless on the merits. *See supra* at 15-25. Even if they otherwise merited review, however, Petitioner's objections to FERC's regulatory actions constitute a collateral attack on an unappealed, final order of FERC which should not be addressed outside the avenues explicitly provided by Congress. *See* 16 U.S.C. § 825*l*(b), App. 12-13; *Mississippi Power & Light*, 487 U.S. at 376.

Section 825*l*(b) of Title 16 of the United States Code provides that a party aggrieved by a FERC order "may obtain review of such order in the United States Court of Appeals" and that upon filing of a petition for such review, the Court of Appeals "shall have jurisdiction- . . . which . . . shall be exclusive." This Court has held that § 825*l* provides "a specific, complete and exclusive mode for judicial review" of "all issues inhering in the controversy" underlying an order of FERC. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). A state agency which seeks to modify the result of FERC's determinations, therefore, must do so exclusively through recourse to FERC and then through an appeal to the U.S. Court of Appeals. *Id.*[19] It may not collaterally challenge in other fora FERC's actual determinations or determinations which FERC could have made had the issues been placed before it. *Mississippi Power & Light*, 487 U.S. at 375. *See also Williams Natural Gas Co. v. City of Oklahoma*, 890 F.2d 255, 263 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3236 (1990) ("jurisdiction is not an issue with which FERC is unfamiliar or which it is incapable of addressing on appeal").

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[19] *See also Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 188 (8th Cir. 1988) (private damages award by arbitrator held to be an impermissible collateral attack on FERC rate determination and evasion of § 825*l*); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1566 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987) (if party wished to contest FERC's position on a particular issue, "it could have done so before the Commission, and, if it did not get satisfaction there, could have brought its contentions before the courts"); *Safe Harbor Water Power Corp. v. Federal Power Comm'n*, 124 F.2d 800, 804 (3rd Cir.

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In Maine Yankee's 1988 rate case, the MPUC acquiesced in a settlement negotiated by the parties which fixed, inter alia, Maine Yankee's decommissioning expense and its rate of return on common equity. *Maine Yankee*, 581 A.2d at 802, App. 62. *See also* Settlement Agreement, App. 53-57. The MPUC, a party to the proceeding, neither objected to nor appealed from FERC's approval of the settlement or FERC's exercise of jurisdiction.[20] *Maine Yankee*, 581 A.2d at 801, App. 61. Instead, it

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1941), *cert. denied*, 316 U.S. 663 (1942) (holding that procedure for review established by § 825*l* is "exclusive"); *Mega Renewables v. County of Shasta*, 644 F.Supp. 491, 499 (E.D. Cal. 1986) ("whether or not FERC should have issued a license for this project is a question that should have been litigated before FERC and, if necessary, appealed directly to the Ninth Circuit"); *Washington Pub. Power Supply Sys. v. Pacific N.W. Power Co.*, 213 F.Supp. 404, 408 (D. Or. 1962) (holding that § 825*l* provides a "specific, complete and exhaustive mode of judicial interpretation and construction" of FERC orders); *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) (proper procedure for challenge to and determination of the justness and reasonableness of apportionment of a loss relative to wholesale charges " . . . is to follow the remedies available in the proceeding for FERC [including] . . . appeals to the proper court").

[20] In Maine Yankee's 1981 FERC rate case, the issue of FERC's exclusive jurisdiction over Maine Yankee's decommissioning expense was raised by Petitioner when it complained that FERC should approve no settlement of Maine Yankee's decommissioning expense that did not reflect the provisions of the newly-enacted NDFA. *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶61,141 at 61,398. FERC rejected Petitioner's objections and approved a settlement which neither accommodated the Maine law nor acknowledged its validity. *Id.* at 61,310. Petitioner took no appeal from this final order of FERC.

returned to Maine and issued its own order purporting to change the results reached at FERC and denying FERC's exclusive jurisdiction over Maine Yankee's decommissioning. For this Court now to hear Petitioner's challenge to FERC authority is to sanction Petitioner's collateral attack on the 1988 FERC order and to encourage evasion of the procedural remedies explicitly provided by Congress in Section 825*l*(b). Accordingly, the petition for certiorari should be denied.

VIII. CONCLUSION

The petition for certiorari should be denied because (1) it presents no important question of federal law, (2) the decision of the Supreme Judicial Court of Maine is not in conflict with the reported decision of any court in the United States of America, (3) the state court decision was clearly correct in concluding that the MPUC order and the NDFA are preempted, and (4) Petitioner's challenge to FERC jurisdiction over Respondent's decommissioning is an impermissible collateral attack on a final, unappealed order of FERC.

Dated: February 22, 1991

Respectfully submitted,

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APPENDIX A

RELEVANT SECTIONS FROM THE FEDERAL POWER ACT, 16 U.S.C. §§ 791a *et seq.* (1989)

SUBCHAPTER II – REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission

shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 823i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(June 10, 1920, ch. 285, § 201, as added Aug. 26. 1935, ch. 687, title II, § 213, 49 Stat. 847, and amended Nov. 9, 1978, Pub. L. 95-617, title II, § 204(b), 92 Stat. 3140.)

* * *

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid,

for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided,* That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs

to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. for purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, ch. 285, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub. L. 100-473, § 2, 102 Stat. 2299.)

* * *

SUBCHAPTER III – LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 825. Accounts and records

(a) Duty to keep

Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may be rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this chapter shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and examination by the Commission

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) Controlling individual

The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission.

(June 10, 1920, ch. 285, § 301, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 854.)

* * *

§ 825a. Rates of depreciation; notice to State authorities before fixing

(a) The Commission may, after hearing, require licensees and public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may, from time to time, ascertain and determine, and by order fix, the proper and adequate rates of depreciation of the several classes of property of each licensee and public utility. Each licensee and public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed. The licensees and public utilities subject to the jurisdiction of the Commission shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefore by the Commission. No such licensee or public utility shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any public utility, the percentage rate of depreciation to be allowed, as to any class or property of such public utility, or the composite depreciation rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or

as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(June 10, 1920, ch. 285, § 302, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 855.)

* * *

§ 825l. Review of orders

(a) Application of rehearing; time periods; modification of order

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice

and in such manner, as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith by transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show

to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860, and amended June 25,

1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 16, 72 Stat. 947.)

APPENDIX B

I.R.C. § 468A (1989)

§ 468A. Special rules for nuclear decommissioning costs

(a) In general

If the taxpayer elects the application of this section, there shall be allowed as a deduction for any taxable year the amount of payments made by the taxpayer to a Nuclear Decommissioning Reserve Fund (hereinafter referred to as the "Fund") during such taxable year.

(b) Limitation on amounts paid into Fund

The amount which a taxpayer may pay into the Fund for any taxable year shall not exceed the lesser of –

(1) the amount of nuclear decommissioning costs allocable to the Fund which is included in the taxpayer's cost of service for ratemaking purposes for such taxable year, or

(2) The ruling amount applicable to such taxable year.

(c) Income and deductions of the taxpayer

(1) Inclusion of amounts distributed

There shall be includible in the gross income of the taxpayer for any taxable year –

(A) any amount distributed from the Fund during such taxable year, other than any amount distributed to pay costs described in subsection (e)(4)(B), and

(B) except to the extent provided in regulations, amounts properly includible in gross income in the case of any deemed

distribution under subsection (e)(6), any termination under subsection (e)(7), or the disposition of any interest in the nuclear powerplant.

(2) Deduction when economic performance occurs

In addition to any deduction under subsection (a), there shall be allowable as a deduction for any taxable year the amount of the nuclear decommissioning costs with respect to which economic performance (within the meaning of section 461(h)(2)) occurs during such taxable year.

(d) Ruling amount

For purposes of this section –

(1) Request required

No deduction shall be allowed for any payment to the Fund unless the taxpayer requests, and receives, from the Secretary a schedule of ruling amounts.

(2) Ruling amount

The term "ruling amount" means, with respect to any taxable year, the amount which the Secretary determines under paragraph (1) to be necessary to –

(A) fund that portion of the nuclear decommissioning costs of the taxpayer with respect to the nuclear powerplant which bears the same ratio to the total nuclear decommissioning costs with respect to such nuclear powerplant as the period for which the Fund is in effect bears to the estimated useful life of such nuclear powerplant, and

(B) prevent any excessive funding of such costs or the funding of such costs at a

rate more rapid than level funding, taking into account such discount rates as the Secretary deems appropriate.

(3) Review of amount

The Secretary shall at least once during the useful life of the nuclear powerplant (or more frequently, upon the request of the taxpayer) review, and revise if necessary, the schedule of ruling amounts determined under paragraph (1).

(e) Nuclear Decommissioning Reserve Fund

(1) In general

Each taxpayer who elects the application of this section shall establish a Nuclear Decommissioning Reserve Fund with respect to each nuclear powerplant to which such election applies.

(2) Taxation of fund

(A) In general

There is hereby imposed on the gross income of the Fund for any taxable year a tax at a rate equal to the highest rate of tax specified in section 11(b), except that –

(i) there shall not be included in the gross income of the Fund any payment to the Fund with respect to which a deduction is allowable under subsection (a), and

(ii) there shall be allowed as a deduction to the Fund any amount paid by the Fund which is described in paragraph (4)(B) (other than an amount paid to the taxpayer) and which would be

deductible under this chapter for purposes of determining the taxable income of a corporation.

(B) Tax in lieu of other taxation

The tax imposed by subparagraph (A) shall be in lieu of any other taxation under this subtitle of the income from assets in the Fund.

(C) Fund treated as corporation

For purposes of subtitle F –

(i) the Fund shall be treated as if it were a corporation, and

(ii) any tax imposed by this paragraph shall be treated as a tax imposed by section 11.

(3) Contributions to Fund

The Fund shall not accept any payments (or other amounts) other than payments with respect to which a deduction is allowable under subsection (a).

(4) Use of Fund

The Fund shall be used exclusively for –

(A) satisfying, in whole or in part, any liability of any person contributing to the Fund for the decommissioning of a nuclear powerplant (or unit thereof),

(B) to pay administrative costs (including taxes) and other incidental expenses of the Fund (including legal, accounting, actuarial, and trustee expenses) in connection with the operation of the Fund, and

(C) to the extent that a portion of the Fund is not currently needed for purposes

described in subparagraph (A) or (B), making investments described in section 501(c)(21)(B)(ii).

(5) Prohibitions against self-dealing

Under regulations prescribed by the Secretary, for purposes of section 4951 (and so much of this title as relates to such section), the Fund shall be treated in the same manner as a trust described in section 501(c)(21).

(6) Disqualification of Fund

In any case in which the Fund violates any provision of this section or section 4951, the Secretary may disqualify such Fund from the application of this section. In any case to which this paragraph applies, the Fund shall be treated as having distributed all of its funds on the date such determination takes effect.

(7) Termination upon completion

Upon substantial completion of the nuclear decommissioning of the nuclear powerplant with respect to which a Fund relates, the taxpayer shall terminate such Fund.

(f) Nuclear powerplant

For purposes of this section, the term "nuclear powerplant" includes any unit thereof.

(g) Time when payments deemed made

For purposes of this section, a taxpayer shall be deemed to have made a payment to the Fund on the last day of a taxable year if such payment is made on account of such taxable year and is made within 2½ months after the close of such taxable year.

(Added Pub. L. 98-369, div. A, title I, § 91(c)(1), July 18, 1984, 98 Stat. 604, and amended Pub. L. 99-514, title XVIII, § 1807(a)(4)(A)(i), (B)-(E)(vi), Oct. 22, 1986, 100 Stat. 2812, 2813.)

APPENDIX C

RELEVANT SECTIONS FROM REGULATIONS OF THE NUCLEAR REGULATORY COMMISSION 10 C.F.R. PART 50 (1990)

PART 50 – DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

APPLICATIONS FOR LICENSES, FORM, CONTENTS, INELIGIBILITY OF CERTAIN APPLICANTS

§ 50.33 Contents of applications; general information.

Each application shall state:

(a) Name of applicant;

(b) Address of applicant;

(c) Description of business or occupation of applicant;

(d)(1) If applicant is an individual, state citizenship.

(2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

(4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

(e) The class of license applied for, the use to which the facility will be put, the period of time for which the license is sought, and a list of other licenses, except operator's licenses, issued or applied for in connection with the proposed facility.

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each

of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. An application to renew or extend the term of an operating license must include the same financial information as is required in an application for an initial license.

(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:

(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;

(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and

(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility.

(g) If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ)[3], as well as the plans of State governments wholly or partially within the ingestion pathway EPZ.[4] Generally, the plume exposure pathway EPZ for nuclear power reactors shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to the local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway shall focus on such actions as are appropriate to protect the food ingestion pathway.

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[3] Emergency Planning Zones (EPZs) are discussed in NUREG-0396, EPA 520/1-78-016, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light-Water Nuclear Power Plants," December 1978.

[4] If the State and local emergency response plans have been previously provided to the NRC for inclusion in the facility docket, the applicant need only provide the appropriate reference to meet this requirement.

(h) If the applicant proposes to construct or alter a production or utilization facility, the application shall state the earliest and latest dates for completion of the construction or alteration.

(i) If the proposed activity is the generation and distribution of electric energy under a class 103 license, a list of the names and addresses of such regulatory agencies as may have jurisdiction over the rates and services incident to the proposed activity, and a list of trade and news publications which circulate in the area where the proposed activity will be conducted and which are considered appropriate to give reasonable notice of the application to those municipalities, private utilities, public bodies, and cooperatives, which might have a potential interest in the facility.

(j) If the application contains Restricted Data or other defense information, it shall be prepared in such manner that all Restricted Data and other defense information are separated from the unclassified information.

(k)(1) For an application for an operating license for a production or utilization facility, information in the form of a report, as described in § 50.75 of this part, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.

(2) On or before July 26, 1990, each holder of an operating license for a production or utilization facility in effect on July 27, 1990, shall submit information in the form of a report as described in § 50.75 of this part, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.

* * *

§ 50.75 Reporting and recordkeeping for decommissioning planning.

(a) This section establishes requirements for indicating to NRC how reasonable assurance will be provided that funds will be available for decommissioning. For electric utilities it consists of a step-wise procedure as provided in paragraphs (b), (c), (e), and (f) of this section. Funding for decommissioning of electric utilities is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation. The requirements of this section, in particular paragraph (c), are in addition to, and not substitution for, other requirements, and are not intended to be used, by themselves, by other agencies to establish rates.

(b) Each electric utility applicant for or holder of an operating license for a production or utilization facility of the type and power level specified in paragraph (c) of this section shall submit a decommissioning report, as required by § 50.33(k) of this part containing a certification that financial assurance for decommissioning will be provided in an amount which may be more but not less than the amount stated in the table in paragraph (c)(1) of this section, adjusted annually using a rate at least equal to that stated in paragraph (c)(2) of this section, by one or more of the methods described in paragraph (e) of this section as acceptable to the Commission. The amount stated in the applicant's or licensee's certification may be based on a cost estimate for decommissioning the facility. As part of the certification, a copy of the financial instrument obtained to satisfy the requirements of paragraph (e) of this section is to be submitted to NRC.

(c) Table of minimum amounts (January 1986 dollars) required to demonstrate reasonable assurance of funds for decommissioning by reactor type and power level, P (in MWt); adjustment factor.[1]

	Millions
(1)(i) For a PWR:	
greater than or equal to 3400 MWt.....	$105
between 1200 MWt and 3400 MWt (For a PWR of less than 1200 MWt, use P = 1200 MWt)	$(75+0.0088P)
(ii) For a BWR:	
greater than or equal to 3400 MWt.....	$135
between 1200 MWt and 3400 MWt (For a BWR of less than 1200 MWt, use P = 1200 MWt)	$(104+0.009P)

(2) An adjustment factor at least equal to 0.65 L + 0.13 E + 0.22 B is to be used where L and E are escalation factors for labor and energy, respectively, and are to be taken from regional data of U.S. Department of Labor Bureau of Labor Statistics and B is an escalation factor for waste burial and is to be taken from NRC report NUREG-1307, "Report on Waste Burial Charges."

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[1] Amounts are based on activities related to the definition of "Decommission" in § 50.2 of this part and do not include the cost of removal and disposal of spent fuel or of nonradioactive structures and materials beyond that necessary to terminate the license.

(d) Each non-electric utility applicant for or holder of an operating license for a production or utilization facility shall submit a decommissioning report as required by § 50.33(k) of this part containing a cost estimate for decommissioning the facility, an indication of which method or methods described in paragraph (e) of this section as acceptable to the Commission will be used to provide funds for decommissioning, and a description of the means of adjusting the cost estimate and associated funding level periodically over the life of the facility.

(e)(1) As provided in paragraphs (e) (2) and (3) of this section, financial assurance is to be provided by the following methods:

(i) Prepayment. Prepayment is the deposit prior to the start of operation into an account segregated from licensee assets and outside the licensee's administrative control of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs. Prepayment may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(ii) External sinking fund. An external sinking fund is a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the licensee's administrative control in which the total amount of funds would be sufficient to pay decommissing costs at the time termination of operation is expected. An external sinking fund may be in the form of a trust, escrow account, government fund, certificate of deposit, or deposit of government securities.

(iii) A surety method, insurance, or other guarantee method. These methods guarantee that decommissioning costs will be paid should the licensee default. A surety method may be in the form of a surety bond, letter of credit, or line of credit. Any surety method or insurance used to provide financial insurance for decommissioning must contain the following conditions:

(A) The surety method or insurance must be open-ended or, if written for a specified term, such as five years, must be renewed automatically unless 90 days or more prior to the renewal date, the issuer notifies the Commission, the beneficiary, and the licensee of its intention not to renew. The surety or insurance must also provide that the full face amount be paid to the beneficiary automatically prior to the expiration without proof of forfeiture if the licensee fails to provide a replacement acceptable to the Commission within 30 days after receipt of notification of cancellation.

(B) The surety or insurance must be payable to a trust established for decommissioning costs. The trustee and trust must be acceptable to the Commission. An acceptable trustee includes an appropriate State or Federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

(C) The surety method or insurance must remain in effect until the Commission has terminated the license.

(2) For a licensee other than an electric utility, acceptable methods of providing financial assurance for decommissioning are–

(i) Prepayment;

(ii) An external sinking fund, in which deposits are made at least annually, coupled with a surety method or insurance, the value of which may decrease by the amount being accumulated in the sinking fund,

(iii) A surety method, insurance, or other guarantee method. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in Appendix A of 10 CFR Part 30. A parent company guarantee may not be used in combination with other financial methods to satisfy the requirements of this section.

(iv) In the case of Federal, State, or local government licensees, a statement of intent containing a cost estimate for decommissioning, and indicating that funds for decommissioning will be obtained when necessary.

(3) For an electric utility, acceptable methods of providing financial assurance for decommissioning are–

(i) Prepayment;

(ii) An external sinking fund in which deposits are made at least annually:

(iii) A surety method or insurance; and

(iv) In the case of Federal government licensees, a statement of intent containing a cost estimate for decommissioning or an amount based on paragraph (c) of this section, and indicating that funds for decommissioning will be obtained when necessary.

(f) Each licensee shall at or about 5 years prior to the projected end of operation submit a preliminary

decommissioning plan containing a cost estimate for decommissioning and an up-to-date assessment of the major technical factors that could affect planning for decommissioning. Factors to be considered in submitting this information include–

(1) The decommissioning alternative anticipated to be used. The requirements of § 50.82(b)(1) must be considered at this time;

(2) Major technical actions necessary to carry out decommissioning safely;

(3) The current situation with regard to disposal of high-level and low-level radioactive waste;

(4) Residual radioactivity criteria;

(5) Other site specific factors which could affect decommissioning planning and cost.

If necessary, this submittal shall also include plans for adjusting levels of funds assured for decommissioning to demonstrate that a reasonable level of assurance will be provided that funds will be available when needed to cover the costs of decommissioning.

(g) Each licensee shall keep records of information important to the safe and effective decommissioning of the facility in an identified location until the license is terminated by the Commission. If records of relevant information are kept for other purposes, reference to these records and their locations may be used. Information the Commission considers important to decommissioning consists of–

(1) Records of spills or other unusual occurrences involving the spread of contamination in and around the facility, equipment, or site. These records may be limited to instances when significant contamination remains after any cleanup procedures or when there is reasonable likelihood that contaminants may have spread to inaccessible areas as in the case of possible seepage into porous materials such as concrete. These records must include any known information on identification of involved nuclides, quantities, forms, and concentrations.

(2) As-built drawings and modifications of structures and equipment in restricted areas where radioactive materials are used and/or stored and of locations of possible inaccessible contamination such as buried pipes which may be subject to contamination. If required drawings are referenced, each relevant document need not be indexed individually. if drawings are not available, the licensee shall substitute appropriate records of available information concerning these areas and locations.

(3) Records of the cost estimate performed for the decommissioning funding plan or of the amount certified for decommissioning, and records of the funding method used for assuring funds if either a funding plan or certification is used.

[53 FR 24049, June 27, 1988]

* * *

§ 50.82 Application for termination of license.

(a) Any licensee may apply to the Commission for authority to surrender a license voluntarily and to

decommission the facility. For a facility that permanently ceases operation after July 27, 1988, this application must be made within two years following permanent cessation of operations, and in no case later than one year prior to expiration of the operating license. Each application for termination of license must be accompanied, or preceded, by a proposed decommissioning plan. For a facility which has permanently ceased operation prior to July 27, 1988, requirements for contents of the decommissioning plan as specified in paragraphs (b) through (d) of this section may be modified with approval of the Commission to reflect the fact that the decommissioning process has been initiated previously.

(b) The proposed decommissioning plan must include–

(1) The choice of the alternative for decommissioning with a description of activities involved.

(i) For an electric utility licensee, an alternative is acceptable if it provides for completion of decommissioning within 60 years. Consideration will be given to an alternative which provides for completion of decommissioning beyond 60 years only when necessary to protect the public health and safety. Factors to be considered in evaluating an alternative which provides for completion of decommissioning beyond 60 years are set out in paragraph (b)(1)(iii) of this section.

(ii) For a licensee other than an electric utility, an alternative is acceptable if it provides for completion of decommissioning without significant delay. Consideration will be given to an alternative which provides for

delayed completion of decommissioning only when necessary to protect the public health and safety. Factors to be considered in evaluating an alternative which provides for delayed completion of decommissioning are set out in paragraph (b)(1)(iii) of this section.

(iii) Factors to be considered in making the evaluations required by paragraphs (b)(1)(i) and (b)(1)(ii) of this section include unavailability of waste disposal capacity and other site specific factors affecting the licensee's capability to carry out decommissioning safely, including presence of other nuclear facilities at the site.

(2) A description of controls and limits on procedures and equipment to protect occupational and public health and safety;

(3) A description of the planned final radiation survey;

(4) An updated cost estimate for the chosen alternative for decommissioning, comparison of that estimate with present funds set aside for decommissioning, and plan for assuring the availability of adequate funds for completion of decommissioning.

(5) A description of technical specifications, quality assurance provisions and physical security plan provisions in place during decommissioning,

(c) Decommissioning plans which propose an alternative that delays completion of decommissioning by including a period of storage or long-term surveillance must provide that–

(1) Funds needed to complete decommissioning be placed into an account segregated from licensee assets

and outside the licensee's administrative control during the storage or surveillance period, or a surety method or fund statement of intent be maintained in accordance with the criteria of § 50.75(e), and

(2) Means be included for adjusting cost estimates and associated funding levels over the storage or surveillance period.

(d) For decommissioning plans in which the major dismantlement activities are delayed by first placing the facility in storage, planning for these delayed activities may be less detailed. Updated detailed plans must be submitted and approved prior to the start of these activities.

(e) If the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, and after notice to interested persons, the Commission will approve the plan subject to such conditions and limitations as it deems appropriate and necessary and issue an order authorizing the decommissioning.

(f) The Commission will terminate the license if it determines that–

(1) The decommissioning has been performed in accordance with the approved decommissioning plan and the order authorizing decommissioning; and

(2) The terminal radiation survey and associated documentation demonstrates that the facility and site are suitable for release for unrestricted use.

[53 FR 24051, June 27, 1988]

APPENDIX D

RELEVANT SECTIONS FROM THE ATOMIC ENERGY ACT OF 1954, 42 U.S.C. § 2011 *et seq.* (1988)

§ 2019. Applicability of Federal Power Act

Every licensee under this chapter who holds a license from the Commission for a utilization or production facility for the generation of commercial electric energy under section 2133 of this title and who transmits such electric energy in interstate commerce or sells it at wholesale in interstate commerce shall be subject to the regulatory provisions of the Federal Power Act.

Aug. 1, 1946, c. 724, § 272, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 960.

* * *

§ 2021. Cooperation with States – Purpose

(a) It is the purpose of this section –

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and

use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

Agreements with States

(b) Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State –

(1) byproduct materials;

(2) source materials;

(3) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

Commission regulation of certain activities

(c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of –

(1) the construction and operation of any production or utilization facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

APPENDIX E

U.S. CONST. art. vi, cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX F

STATE OF MAINE
PUBLIC UTILITIES
COMMISSION

Docket No. 82-179

March 23, 1990

MAINE YANKEE ATOMIC
POWER COMPANY
Re: Decommissioning Financing
Plan

ORDER
GRANTING
MAINE
YANKEE'S
REQUEST FOR
STAY

GORDON, Chairman; HARRINGTON and PAINE, Commissioners

Maine Yankee filed, on March 1, 1990, a Motion to Stay or Modify parts of our final Order in this case. That Order was issued on February 22, 1990. Maine Yankee filed a similar Motion on March 12, 1990, framing it as a Request for Reconsideration. Both filings request the same relief from the operation of our Order. The filings request that we stay the operation of the second sentence of paragraph 3 on page 52 of the order as well as paragraph 4 on page 52 of the Order until the February 22 Order is judicially determined by a final judgment to be valid and, if valid, until the Federal Energy Regulatory Commission approves the necessary tariff amendments authorizing Maine Yankee to bill and to collect from its wholesale customers the increased payments to the Decommissioning Trust Fund being ordered by our February 22, 1990 Order.

We grant Maine Yankee's requests in part but wish to clarify parts of our Order and delineate specifically the terms under which we grant the stay sought.

Paragraph 7 of each of Maine Yankee's filings notes that our Order at page 45 requires Maine Yankee, in order to comply with 35-A M.R.S.A. § 4353(3)(B)(2), to adjust the annual amount charged to all of its customers on a pro rata basis. That section of our Order reads as follows:

> We find that the manner in which the costs are shared is reasonable; that is, *pro rata* based on the amount of output to which each of Maine Yankee's customers is entitled. The annual amount to be charged, of course, must be adjusted in accordance with our finding concerning the cost of decommissioning.

Maine Yankee argues that it is not possible without FERC approval to comply with this section of the Order because, we presume, we cannot order a change in the amount that Maine Yankee's customers pay to Maine Yankee, whether or not that money will be paid to the trust fund. The amounts paid by customers is of course a rate for electric service. Because Maine Yankee is a wholesale utility, of course all rates are set by FERC.

35-A M.R.S.A. § 4353(3)(B)(2) reads as follows:

> B. The commission shall approve the decommissioning financing plan if it finds that the licensee, in the judgment of the commission, has provided reasonable assurance that: . . . . (2) The share of the estimated cost of decommissioning for each electric utility to which the plant supplies power is reasonable;

Maine Yankee has been collecting funds for the decommissioning trust fund in a *pro rata* manner among

all of its customers pursuant to the Interim Plan and current FERC rates, and requested in this proceeding that it be permitted to continue to collect in that manner. In our February 22 Order, we found Maine Yankee's proposed plan for the *pro rata* sharing of decommissioning costs among customers based on the amount of output to be reasonable. That is, the division of decommissioning costs to the extent that they are already recognized by the FERC in rates, is reasonable pursuant to 35-A M.R.S.A. § 4353(3)(B)(2). We did not order Maine Yankee to collect the difference between the amount we ordered Maine Yankee to pay into the Trust Fund annually and the amount FERC currently reflects in rates from *customers,* because a change in amount from customers must be made by FERC. The additional amount we ordered into the Trust Fund must come from Maine Yankee, essentially from shareholders or sponsors, until such time as the FERC allows these costs to be collected in rates. The share for the additional amount should be divided among shareholders according to percent ownership. We find this to be a reasonable arrangement given the limitations on our ratemaking authority over Maine Yankee. When the increased decommissioning costs now imposed by the State of Maine are fully reflected in Maine Yankee's wholesale rates, we would find reasonable the *pro rata* division of costs among all of Maine Yankee's customers, shareholder and non-shareholder alike.

Turning to the Motion by Maine Yankee for a Stay of certain sections of our Order, we note the current predicament of Maine Yankee caused by the February 22, 1990 Order and a FERC Order approving a stipulation whereby Maine Yankee agreed to not request a change in

rates at FERC that would be effective before February 16, 1991. Maine Yankee argues that our February 22 Order is not a sufficient force majeure circumstance that would allow it to file for a change in rates at FERC before the stay-out date. We do not know whether that assertion is true. Meanwhile, however, the Company has indicated its intention of appealing our order to the Maine Supreme Judicial Court. Accordingly, we grant a stay of the second sentence of paragraph 3 on page 52 of our February 22 Order and paragraph 4 on page 52 of our February 22 Order under the following conditions:

1. Maine Yankee must file an appeal for judicial review of our Order to the Maine Supreme Judicial Court within the time period for taking an appeal;

2. The stay shall be removed 10 days after a final decision by the Maine Supreme Judicial Court on the appeal taken by Maine Yankee concerning the validity or legality of our February 22 Order;

3. Regardless of condition number 2 immediately above, the stay shall be removed if FERC allows a change to Maine Yankee's rates which reflect the decommissioning costs imposed by our February 22 Order; and

4. If the Commission's Order of February 22 is judicially upheld, Maine Yankee must make the decommissioning trust fund whole, pursuant to the terms of our Order, retroactive to March 1, 1990. The exact terms upon which the trust fund will be made whole will be determined at that time.

Even during the pendency of the stay, Maine Yankee must of course continue to pay into the Trust Fund the

amounts that it is collecting from its customers pursuant to the current FERC rates.

Dated at Augusta, Maine this 23rd day of March, 1990.

BY ORDER OF THE COMMISSION

/s/ Charles A. Jacobs
Charles A. Jacobs
Administrative Director

(SEAL)

A true copy.
Attest: /s/ Charles A. Jacobs
Charles A. Jacobs
Administrative Director

COMMISSIONERS VOTING FOR: Gordon
Harrington
Paine

"This document has been designated for publication"

Concurring Statement of Chairman Gordon

Although I agree with the Order we are issuing here, I believe it would have been better, from both the practical administrative and fairness points of view, to extend the stay provision to the end of the FERC "stay-out" provision with Maine Yankee, subject of course to condition 3 of the Order.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of

its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. *Reconsideration* of the Commission's Order may be requested under Section 65(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. *Appeal of a final decision* of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. *Additional court review* of constitutional issues or issues involving the justness of reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

NOTE The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

APPENDIX G

44 FERC ¶61,368

Maine Yankee Atomic Power Company (represented by LeBoeuf, Lamb, Leiby & MacRae), Docket No. ER88-202-000

Letter Order.

(Issued September 20, 1988)

By Direction of the Commission: Lois D. Cashell, Acting Secretary.

On July 27, 1988, you filed a settlement agreement among Maine Yankee Atomic Power Company ("the Company"), the Public Advocate of the State of Maine, and the Municipal Customer Group in the above-referenced docket. The settlement is also applicable to the ten sponsoring utilities of Maine Yankee's nuclear power plant at Wiscasset, Maine.[1] On August 1, 1988, staff and the Public Advocate of the State of Maine submitted comments in support of the settlement. On August 4, 1988, the Company submitted reply comments in support of the settlement. No other comments were received. On August 5, 1988, the presiding administrative law judge certified the uncontested settlement to the Commission.

The subject settlement is in the public interest and is hereby approved. The settlement rates submitted with the

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[1] The ten sponsoring utilities are Central Maine Power Company, New England Power Company, Connecticut Light and Power Company, Bangor Hydro-Electric Company, Maine Public Service Company, Public Service Company of New Hampshire, Cambridge Electric Light Company, Montaup Electric Company, Western Massachusetts Electric Company, and Central Vermont Public Service Corporation.

settlement are accepted for filing and are designated and made effective as shown on the attached enclosure. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

With regard to Article IV of the settlement agreement, the Commission expressly conditions its acceptance of the settlement upon Maine Yankee's inclusion in its tariff of the following equity return reopener clause:

> *Equity Return Reopener Clause*
>
> During the period from August 1-31 of 1989, and every August 1-31 thereafter, any purchaser under this Power Contract, any wholesale requirements customer affected by such Power Contract, any state regulatory commission having jurisdiction over the retail rates of purchasers affected by such Power Contract under this formula, any state consumer counsel of a state having jurisdiction over the retail rates of purchasers affected by such Power Contract under this formula, or any consumer advocate group representing consumers of a state having jurisdiction over the retail rates of purchasers affected by such Power Contract under this formula may file a motion to institute procedures under this equity reopener provision. The Federal Energy Regulatory Commission (Commission) may also institute proceedings under this provision during that time period. The Commission will publish in the *Federal Register* a notice of the motion, or its order to show cause if the Commission proceeds on its own motion, and will allow the company and any other affected party an opportunity to respond. If the Commission sets the equity return for investigation and

hearing under this provision, the following special procedures will apply:

(1) The only issue to be addressed will be the level of the return on equity;

(2) The burden of going forward will be on the party advocating the lower return on equity;

(3) If the return on equity is ultimately determined to be unjust and unreasonable, refunds under 18 C.F.R. § 35.19a will be due, dating back to the later of: (a) 60 days from the date of the motion was filed; or (b) the date of the Commission order setting the matter for investigation and hearing.

(4) If the Commission, or a court on review of the Commission's Opinion No. 285, either orders that the provision required in Opinion No. 285 shall not be required of the other three Yankee companies,[2] or modifies the type of provision that can be required of the other three Yankee companies, Maine Yankee shall, within 15 days from the date of such triggering order, make a FERC compliance filing which conforms its equity reopener clause (including the deletion thereof, if that triggering order provides for deletion) to the triggering order. Maine Yankee will request that such compliance filing be made effective as of the date of such filing (and no party to Docket No. ER88-202 will oppose such request).

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[2] The "other three Yankee companies" are Connecticut Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation, and Yankee Electric Power Company.

(5) If Section 206 of the Federal Power Act is amended to provide for any customer rate refund relief, such equity reopener provision shall be deleted from Maine Yankee's filed tariff. Within 15 days from the signing into law of any such legislation, Maine Yankee shall make a compliance filing deleting such equity reopener provision, and request that such deletion shall be made effective by the Commission as of the date such legislation becomes effective. No party hereto will oppose such request.

Additionally, with regard to Article V of the settlement agreement, the Commission expressly conditions its acceptance of the settlement upon Maine Yankee's inclusion in its tariff of the following provision:

Unit License Life Clause

(1) Within 30 days after the date of a Nuclear Regulatory Commission (NRC) order changing the operating license expiration date for Maine Yankee's nuclear unit at Wiscasset, Maine ("the Unit"), Maine Yankee will, by compliance filing with the FERC, make conforming adjustments to its: (a) depreciation charges; (b) last core nuclear fuel amortization; (c) materials and supplies amortization; and (d) any other amortization or other charges that are based upon or tied to the Unit's useful plant life.

The allowable cost recovery for each of these foregoing items will be calculated on the basis of the most recent NRC-authorized license life. Maine Yankee is further directed to ensure that each such compliance filing will request from

the Commission an effective date which falls within 30 days of the NRC order.

(2) Within 90 days from the date of any such NRC order changing the operating license expiration date for the Unit, Maine Yankee will file pursuant to Section 205 of the Federal Power Act to show: (a) whether, and to what extent, Maine Yankee believes it appropriate to modify the term of its decommissioning collections and its associated annual decommissioning charges; and (b) if Maine Yankee believes no such change is warranted, the justification therefor; provided, however, that Maine Yankee will request in such filing (and no party hereto will oppose such request) that any final determination with respect to the level of decommissioning charges to be imposed as a result of the proceeding arising out of such filing be made effective as of the date of such filing, and refunds, if any, relating thereto accrue as of the date of such filing.

Within thirty (30) days from the date of this letter Maine Yankee shall file amendments to its tariff which incorporate the Equity Return Reopener and Unit License Life clauses herein ordered. Also within thirty (30) days from the date of this letter any amounts collected in excess of the settlement rate levels shall be refunded together with interest computed under Section 35.19a of the Commission's Regulations. Within fifteen (15) days after making such refunds, the Company shall file with this Commission a compliance report showing monthly billing determinants, revenue receipt dates, and revenues under the prior, present and settlement rates, the monthly revenue refund, and the monthly interest computed, together with a summary of such information for the total

refund period. The Company shall furnish copies of such report to the affected wholesale customers and to each state commission within whose jurisdiction the wholesale customers distribute and sell electric energy at retail.

This letter terminates Docket No. ER88-202-000. A new sub-docket will be assigned in ER88-202 upon receipt of the required compliance refund report.

Enclosure

Rate Schedule Designations

Filing Date: July 27, 1988
Effective Date: August 16, 1988

Designation – Description

(1) Supplement No. 13 to Rate Schedule FPC No. 1 – Settlement Agreement with participating intervenors

(2) Supplement No. 1 to Supplement No. 13 to Rate Schedule FPC No. 1 (Supersedes Supplement No. 11 to Rate Schedule FPC No. 1) – Reduction in Rate of Return on common equity to 12.9%

(3) Supplement No. 2 to Supplement No. 13 to Rate Schedule FPC No. 1 (Supersedes Supplement No. 12 to Rate Schedule PFC No. 1) – Nuclear plant decommissioning expenses

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Maine Yankee Atomic Power Company
Docket No. ER88-202-000

Before: The Honorable Max L. Kane,
Presiding Administrative Law Judge

SETTLEMENT AGREEMENT

July 27, 1988

* * *

ARTICLE I

SCOPE OF SETTLEMENT

This Settlement resolves all issues raised in pleadings, prefiled testimony, and any Commission order in Docket No. ER88-202-000. To the extent not otherwise expressly addressed in this Settlement, the rates charged by Maine Yankee effective August 16, 1988, shall be consistent with the January 15, 1988 Maine Yankee rate application, as amended by the April 14, 1988 compliance filing in this docket.

ARTICLE II

SETTLEMENT BILLING PROVISIONS

For service on and after August 16, 1988, until any further order of the Commission modifying Maine Yankee's rates, and subject to Articles III and V hereof, Maine Yankee shall reflect the following cost-of-service values in calculating billings pursuant to Section 7 of the Power Contract and the associated formula rate specification submitted pursuant to Article VI hereof:

1. Rate of Return on Common Equity – In computing the "composite percentage" return on the net Unit investment, Maine Yankee shall use a common equity rate of return of twelve point nine percent (12.9%).

2. Amortization of Materials and Supplies and Last Core Nuclear Fuel – Maine Yankee shall incorporate into its billing calculation amounts for amortization of materials and supplies and last core nuclear fuel as proposed in its January 15, 1988 rate application in this case; *provided*, however, that if and to the extent that Maine Yankee realizes any net salvage value for materials and supplies at the end of the Unit's service life, Maine Yankee shall provide a rate credit to its wholesale customers to reflect such net salvage value. Maine Yankee will prorate such credits, as appropriate, among such customers to reflect the extent to which such customers paid rates reflecting amortization of materials and supplies. At the time that such rate credit is provided, Maine Yankee will make an informational filing with the Commission (which shall not be deemed a filing pursuant to Section 205 of the Federal Power Act) to show the amount of the credits and the calculation thereof.

3. Depreciation – Maine Yankee shall use the methodology set forth in the January 15, 1988 rate application in this case for computing depreciation expense.

4. Decommissioning Expense – Maine Yankee shall collect $9,073,943 annually for decommissioning expense, exclusive of any income tax liability. The underlying assumptions that the parties have relied upon in reaching this agreement with respect to such expense are set forth in Appendix A. The annual decommissioning charges,

based on this amount, for each Sponsor and Secondary Purchaser are set forth in Appendix B hereto. Maine Yankee shall, each year, provide to the counsel for active parties to this proceeding an annual report setting forth the investment philosophy and performance for the decommissioning trust fund.

ARTICLE III
DECOMMISSIONING EXPENSE MORATORIUM

1. The parties hereby agree that, subject to the *proviso* set forth below, and notwithstanding the provisions of Article V, Maine Yankee shall not make a filing to place into effect prior to February 16, 1991, any increase in the level of annual decommissioning charges above that stated in Article II, Paragraph 4; *provided*, however, that the foregoing sentence shall not apply if, during the period that this Article would otherwise apply, a referendum or legislation is passed, or regulatory action is taken, which requires the Unit to shut down permanently prior to 2008. Nothing in the *proviso* in the foregoing sentence shall be construed as affecting the rights of any customer of Maine Yankee to protest or otherwise exercise its full rights to contest any filing made by Maine Yankee pursuant to the *proviso* stated in the foregoing sentence.

2. No filing shall be made by a party under Section 206 seeking a decrease in such annual decommissioning charges to be effective prior to February 16, 1991, unless Maine Yankee files to change the level stated in Article II, Paragraph 4.

* * *

Maine Yankee Atomic Power Company
Supplement No. ___ to Rate Schedule
FPC No. 1

In computing the "composite percentage" return on the net Unit investment, Maine Yankee shall use a common equity rate of return of 12.9% per annum.

* * *

Maine Yankee Atomic Power Company

Supplement No. ___ to Rate Schedule FPC No. 1

Line No.	Utilities	Entitlement	Decommissioning
1	Bangor Hydro-Electric Company	6.8986%	$ 626,084
2	Central Maine Power Company	37.4560%	3,398,738
3	New England Power Company	17.9607%	1,629,744
4	Public Service Company of New Hampshire	4.4902%	407,438
5	Central Vermont Public Service Corporation	1.7861%	162,977
6	Montaup Electric Company	3.5821%	325,945
7	Cambridge Electric Light Company	3.5921%	325,945
8	Connecticut Light and Power Company	10.3058%	935,142
9	Western Massachusetts Electric Company	2.6941%	244,461
10	Maine Public Service Company	4.9284%	447,200
11	Eastern Maine Electric Cooperative, Inc.	0.3085%	27,993

Line No.	Utilities	Entitlement	Decommissioning
12	Houlton (to Maine Public Service Company)	0.4073%	36,958
13	Ashburahas	0.0223%	2,023
14	Boylston	0.0202%	1,833
15	Braintree	0.4037%	36,622
16	Chicopee	0.4761%	43,201
17	Danvers	0.2360%	21,415
18	Georgetown	0.0315%	2,858
19	Hingham	0.1524%	13,829
20	Holyoke	0.3474%	31,523
21	Hudson	0.1487%	13,493
22	Hull	0.0569%	5,163
23	Ipswich	0.1141%	10,353
24	Littleton	0.0648%	5,880
25	Marblehead	0.1433%	13,003
26	Middleborough	0.1182%	10,725
27	Middleton	0.0392%	3,557
28	North Attleborough	0.1588%	14,391
29	Paxton	0.0288%	2,613
30	Peabody	0.3706%	33,628
31	Shrewsbury	0.2126%	19,291
32	Sterling	0.0263%	2,866
33	Taunton	0.5337%	48,428
34	Templeton	0.0307%	2,786
35	Wakefield	0.1835%	17,558
36	West Boylston	0.0574%	5,208
37	Westfield	0.2854%	25,897
38	Wolfsboro (to Holyoke)	0.0903%	8,194
39	New Hampshire Electric Cooperative	0.7358%	66,748
40	Conn. Municipal Electric Energy Cooperative	0.4706%	42,702
41	Total Revenues	100.0000%	$ 9,073,943

APPENDIX H

MAINE YANKEE ATOMIC POWER COMPANY

v.

MAINE PUBLIC UTILITIES COMMISSION.

Supreme Judicial Court of Maine.

Argued Sept. 18, 1990.
Decided Oct. 25, 1990.

* * *

Before ROBERTS, WATHEN, GLASSMAN, CLIFFORD, COLLINS, and BRODY, JJ.

WATHEN, Justice.

Maine Yankee Atomic Power Company ("Maine Yankee") appeals the February 22, 1990 order of the Maine Public Utilities Commission ("MPUC") purporting to establish Maine Yankee's cost of decommissioning and to fix the amounts which Maine Yankee must pay annually to its decommissioning trust fund, pursuant to Maine's Nuclear Decommissioning Financing Act ("NDFA"), 35-A M.R.S.A. §§ 4351-4359 (1988).

At the heart of this appeal lies a jurisdictional issue. Maine Yankee maintains that a federal agency, the Nuclear Regulatory Commission ("NRC"), has exclusive jurisdiction over nuclear decommissioning which it exercises in conjunction with the ratemaking agency, the Federal Energy Regulatory Commission ("FERC"). The MPUC, however, asserts that it has concurrent jurisdiction to review and approve any proposed decommissioning financing plan, pursuant to the NDFA. We determine that federal law preempts the NDFA.

Maine Yankee, a licensed nuclear electric generating facility in Wiscasset, is owned by a group of investor-owned electric utilities ("the sponsors") located in Maine, Massachusetts, New Hampshire, Connecticut, and Vermont. Maine Yankee sells to these sponsors, at wholesale, its entire output of electricity on a basis proportional to each sponsor's ownership of the company.

Pursuant to the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, the NRC is statutorily mandated "to protect the radiological health and safety of the public." General Requirements for Decommissioning Nuclear Facilities, 53 Fed.Reg. 24018, 24037 (1988). In keeping with this mandate, the NRC promulgated a rule requiring

> reasonable assurance that at the time of the termination of operations [of nuclear facilities] adequate funds are available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems.

Id. On July 27, 1988, the NRC's general requirements for decommissioning nuclear facilities became effective. *Id.* at 24018-19.

Although the NRC is not authorized to regulate rates or to interfere with the decisions of state or federal agencies respecting the economics of nuclear power, the NRC is responsible for promulgating "rules prescribing allowable funding methods for meeting decommissioning costs." *Id.* at 24037 (citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 212-13, 217-19, 103 S.Ct. 1713, 1726-27, 1729-30, 75 L.Ed.2d 752 (1983)). In setting forth technical and

financial criteria for decommissioning licensed nuclear facilities, the NRC took care to clarify the roles of the state public utility commissions and the Federal Energy Regulatory Commission. To FERC the NRC ascribes

> the responsibility for setting rates for the *transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce* and authorizes the conditions, rates, and charges for interconnections among electric utilities. . . . State public utility commissions have the responsibility for setting rates for *retail* sales of electricity to homeowners and companies doing business in their states.

53 Fed.Reg. at 24037-38 (emphasis added). As a company engaged in the "transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce," Maine Yankee is subject only to the jurisdiction of FERC for the regulation of its utility service and rates. The rates fixed by FERC provide for the costs of operating the plant as well as a return through depreciation of Maine Yankee's investment in the plant. Thus, Maine Yankee asserts that FERC has jurisdiction over its decommissioning plan since "decommissioning expenses have historically been and continue to be treated by FERC as depreciation and booked as negative salvage."

On October 5, 1981, Maine Yankee made a rate increase filing with FERC, seeking "to reflect in its rates the estimated costs of decommissioning" its nuclear generating plant. *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶ 61,141 at p. 61,308 (1982). On October 29, 1981, the MPUC filed a notice of intervention with FERC and took the position that Maine Yankee should "supplement or modify its filing with a 'rate schedule' which provides for

(1) the billing of decommissioning costs in accordance with the method approved by the M.P.U.C. . . . and (2) the segregation of decommissioning funds in a separate account to be used solely for decommissioning purposes." On March 30, 1982, Maine Yankee filed a proposed settlement agreement which attempted to resolve the issues in the subsequent FERC proceeding. *Id.* Meanwhile, on April 15, 1982, the Maine Legislature enacted the Nuclear Decommissioning Financing Act, now codified at 35-A M.R.S.A. §§ 4351-4359 (1988). The NDFA creates a specific mechanism for establishing a decommissioning financing plan and requires any licensee operating a nuclear power plant in Maine to file a proposed plan with the MPUC for review and ultimate approval. *Id.* at § 4353(1-3).

On August 3, 1982, FERC issued its order approving the March 30, 1982 settlement agreement and expressing the view, with regard to the NDFA, that there should be "consistency with the states . . . to the extent that it allows us to properly carry out our duties under the Federal Power Act." *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. at p. 61,310. The MPUC did not appeal this order. Since that time, Maine Yankee and the other parties to this litigation, including the MPUC, have participated in litigated FERC proceedings in 1985 and 1988. *Maine Yankee Atomic Power Co.*, 31 F.E.R.C. ¶ 61,068 (1985); *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶ 61,368 (1988). In each of these cases, the parties negotiated the appropriate cost estimate and funding level for decommissioning expenses and reached a binding settlement; no appeals were taken.

On September 13, 1982, Maine Yankee filed its proposed decommissioning financing plan with the MPUC;

on November 12, 1982, the MPUC notified the company that its filing was incomplete; and on December 7, 1982, the MPUC granted Maine Yankee's request for additional time to supplement its filing. Since then, both parties continued to process the case, but no final plan was ever approved by the MPUC. On August 29, 1983, the MPUC approved a stipulation entered into by the parties as an interim decommissioning financing plan.

On January 15, 1988, Maine Yankee petitioned FERC to modify the period over which it would collect decommissioning costs to 10 years, increase its annual decommissioning charges accordingly, the decrease the level of return on common equity that the company could collect. *Maine Yankee Atomic Power Co.*, 42 F.E.R.C. ¶ 61,307 at p. 61,920 (1988). According to Maine Yankee, these changes "would have permitted the company to fix decommissioning expense based on Maine Yankee's most recent estimate of $178,097,900 and to fund for decommissioning expense at the level of $14,466,467 per year over the course of ten years." On February 8, 1988, the MPUC filed an intervention, making it a party to the proceeding. *Id.* In its March 15, 1988 order, FERC rejected Maine Yankee's proposed accelerated decommissioning schedule and required the company to "file revised rates, reflecting recovery of decommissioning costs over the nuclear unit's remaining life." *Id.* at p. 61,923.

On July 27, 1988, Maine Yankee submitted an uncontested settlement agreement which FERC approved on September 20, 1988, establishing a decommissioning cost basis of $167,000,000 and a fixed rate of return on common equity at 12.9%. *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶ 61,368 at p. 62,224 (1988). In addition, the

parties agreed to a "stay-out" provision prohibiting Maine Yankee from making "a filing to place into effect prior to February 16, 1991, any increase in the level of annual decommissioning charges above that stated in [the settlement agreement]."

On March 20, 1989, Maine Yankee moved that the MPUC approve an amendment to the August 29, 1982 interim decommissioning financing plan which reflected the provisions of the September 20, 1988 FERC order, converting it into an MPUC approved, decommissioning finance plan. On November 17, 1989, hearings began on the issue, and, on November 29, 1989, Maine Yankee, the Public Advocate, and the Industrial Energy Consumer Group ("IECG")[1] filed a stipulation of the issues in the case. On February 22, 1990, the MPUC rejected the stipulation and Maine Yankee's decommissioning financing plan, finding that "$178,097,900 is the most reasonable estimated cost of decommissioning," and ordered that Maine Yankee increase, effective March 1, 1990, its annual contributions to the decommissioning trust fund by $719,961, for a total contribution of $9,793,904.

On March 23, 1990, the MPUC stated that additional funding amounts required under its February 22, 1990 order must be supplied from Maine Yankee's assets or the assets of the sponsors, and granted a request to stay the

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[1] The Industrial Energy Consumer Group ("IECG") is an incorporated association of large industrial consumers of energy located within the State of Maine. Its members are Champion International, International Paper Company, Keyes Fibre Company, United Timber Corporation, Cyro Industries, the Maine Textile Council, Boise Cascade Corporation, Forester Manufacturing Company and James River Corporation. A petition to intervene was filed by this group on May 24, 1989, and subsequently granted.

February 22, 1990 order pending Maine Yankee's appeal to this Court.

The supremacy clause of the United States Constitution provides that the law of the United States "shall be the supreme Law of the Land. . . . " U.S. Const. Art. VI, cl. 2. Thus, under certain circumstances, federal law will preempt even validly enacted state law. In the recent case of *Cent. Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me.1990), we reiterated the principles of preemption:

> "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Id. at 1191 (quoting *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986) (citations omitted)). The exercise of federal supremacy should not be presumed lightly. *Cent. Maine Power Co. v. Town of Lebanon*, 571 A.2d at 1191. Nevertheless, when no other conclusion is possible given the nature of the regulated subject matter, or Congress has clearly ordained this result, federal law must preempt conflicting state law. *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1057 (Me.1986).

Preemption occurs whenever state law conflicts with federal law in such a way that it becomes impossible to comply with both simultaneously. *California v. F.E.R.C.*, ___ U.S. ___, 110 S.Ct. 2024, 109 L.Ed.2d 474 (S.Ct.1990) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984)); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 1150-51, 99 L.Ed.2d 316 (1988). Such a conflict "may be direct, in that the state regulation obviously contradicts federal regulation, or it may arise from Congressional intent, either express or implied, to occupy a particular area." *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d at 1057. Courts must first ascertain the objectives of Congress before determining whether a state statute hinders the achievement of federal policy. *Bayside Enter. v. Maine Agricultural Bargaining Bd.*, 513 A.2d 1355, 1358 (Me.1986).

A federal agency acting within the scope of its congressionally delegated authority may also preempt state regulation. *Louisiana Pub. Serv. Comm. v. F.C.C.*, 476 U.S. at 369, 106 S.Ct. at 1898-99; *see also Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.") Thus, if the NRC and FERC are acting within the scope of their congressionally delegated authority in asserting exclusive jurisdiction over Maine Yankee's decommissioning plan, the MPUC order and the NDFA are preempted.

Maine Yankee claims that the MPUC order and the NDFA should be preempted because (1) they interfere impermissibly with FERC's jurisdiction over wholesale

rates and (2) they intrude on a field which has been pervasively and exclusively regulated by Congress.

1. *Impermissible interference with FERC's jurisdiction*

It is undisputed that FERC has jurisdiction for setting rates for "the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce." 53 Fed.Reg. at 24037-38; *see also Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 2439, 101 L.Ed.2d 322 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."). Maine Yankee argues that the MPUC order directly conflicts with the valid exercise of this ratemaking jurisdiction in several significant respects.

FERC's March 15, 1988 rate order included four specific components of Maine Yankee's costs of service: 1) the rate of return on common equity; 2) amortization of materials and supplies and last core nuclear fuel; 3) decommissioning expense; and 4) other depreciation. The MPUC order, retroactive to March 1, 1990, alters the effect of this order, fixing Maine Yankee's decommissioning expense at $719,961 more per year than the March 15, 1988 FERC order and providing for Maine Yankee's sponsors a lower rate of return.

The decommissioning funding level is a stated amount which cannot vary without FERC approval. *Cent. Vermont Pub. Serv. Corp.*, 44 F.E.R.C. ¶ 61,278 at p. 62,027 (1988); *see also Yankee Atomic Electric Co.*, 30 F.E.R.C. ¶ 61,111, at p. 61,202 (1985). It is one cost of service component which contributes to the establishment of

Maine Yankee's utility rate. Under the "filed rate doctrine" developed under federal law, a federally regulated utility is precluded from collecting any rate other than that of file with the Commission, and the MPUC cannot interfere with the rate set by FERC or the components that go into it. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963, 106 S.Ct. 2349, 2355, 90 L.Ed.2d 943 (1986); *see also Mississippi Power & Light Co. v. Moore*, 108 S.Ct. at 2438-39.

FERC has held that decommissioning expense, like depreciation, should be collected from ratepayers as a cost of service. *Indiana and Michigan Mun. Distrib. Ass'n v. Indiana Michigan Power Co.*, 49 F.E.R.C. ¶ 63,020 at p. 65,084 (1989); *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 at p. 61,658 (1985). Pursuant to the "stay-out" provision in the March 15, 1988 FERC order, however, Maine Yankee cannot file for a rate increase that would become effective prior to February 16, 1991. Thus, the company is prevented from raising the revenues necessary to meet the demands of the MPUC order retroactive to March 1, 1990, by FERC's requirement that decommissioning costs come from ratepayers and Maine Yankee's agreement to delay any rate increase until after February 16, 1991. Given this scenario, it is impossible for Maine Yankee to comply with both the March 15, 1988 FERC order and the February 22, 1990 MPUC order. Applying the principles of preemption set forth earlier, the MPUC order is preempted.

Contrary to FERC policy, the MPUC has directed Maine Yankee to raise revenues from the company's own assets and the assets of its sponsors. FERC fixed the rate of return for Maine Yankee's sponsors at 12.9% in the

March 15, 1988 order. In requiring that additional funding for decommissioning come from the assets of Maine Yankee and its sponsors, the MPUC is impermissibly mandating a reduction in the sponsors' rate of return and weakening the company's financial base. The MPUC has no authority to require a reduction in a component of Maine Yankee's rates, set exclusively by FERC. Any attempt to do so is preempted by FERC. *See Safe Harbor Water Power Corp. v. Fed. Power Comm.*, 179 F.2d 179, 201 (3rd Cir.1949) ("The amount of rate of return is preeminently a question for determination by the Commission."[2]); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 605, 64 S.Ct. 281, 289, 88 L.Ed. 333 (1944) (Setting valid rates enables a company "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.").

Without merit is the MPUC's assertion that its order does not interfere with rate setting, but, like a state income tax, merely affects Maine Yankee's rates indirectly. The United States Supreme Court has held that "the filed rate doctrine is not limited to 'rates' *per se*." *Nantahala v. Thornburg*, 476 U.S. at 966, 106 S.Ct. at 2357. In *Mississippi Power & Light Co. v. Moore*, the Court stated that FERC's exclusive jurisdiction applies not only to rates, but to the components that affect wholesale rates. *Mississippi Power & Light Co. v. Moore*, 108 S.Ct. at 2439 ("FERC's exclusive jurisdiction applies not only to rates,

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[2] The Federal Power Commission ("FPC") was FERC's predecessor as a ratemaking agency. Responsibility for the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy was transferred from the FPC to FERC by 42 U.S.C. §§ 7172(a)(1)(B), 7293 (1983).

but also to power allocations that affect wholesale rates.") While in that case the component at issue was power allocations, the principle applies equally well to decommissioning financing. Both directly affect the calculation of reasonable wholesale rates over which FERC exercises exclusive jurisdiction. Furthermore, the impact of the decommissioning financing plan imposed by the MPUC cannot validly be compared to the impact of a state tax. State taxes are not set by the federal government while Maine Yankee's decommissioning expenses are and have been set by FERC.

Thus, the MPUC order and the NDFA interfere impermissibly with FERC's exclusive jurisdiction over wholesale rates and are preempted by the supremacy clause of the United States Constitution.

2. *Intrusion on a field which has been pervasively and exclusively regulated by Congress*

When Congress has manifested an intent to occupy a particular area through a comprehensive scheme of federal regulation, federal law will preempt state regulation in that area. Congressional intent to occupy an area of law

> may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." . . . [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is

> pre-empted when it actually conflicts with federal law.

Schneidewind v. ANR Pipeline Co., 108 S.Ct. at 1150 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)).

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the Supreme Court made it clear that state regulation of nuclear power is preempted when its purpose is to regulate safety, even when it does not directly conflict with federal law, because "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Id.* at 212, 103 S.Ct. at 1726. Since the passage of the Atomic Energy Act in 1954, Congress has preserved a dual system of regulation, with the federal government maintaining "complete control of the safety and 'nuclear' aspects of energy generation" and "the states exercising traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, [retail] ratemaking, and the like." *Id.*

Maine Yankee argues that "federal law governs nuclear decommissioning chiefly through three interrelated regulatory schemes:" (1) Nuclear Regulatory Commission regulations; (2) certain provisions of the Federal Power Act; (3) section 468A of the Internal Revenue Code.

The MPUC concedes that the NRC has exclusive control over the health and safety aspects of nuclear decommissioning. It disputes, however, the validity of Maine

Yankee's assertion that NRC's jurisdiction extends to the economics of decommissioning.

Economic regulation of nuclear power has traditionally been granted to the states. *Id.* Nevertheless, the NRC has acknowledged its authority, granted by the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, to

> take whatever regulatory actions may be necessary to protect the public health and safety, including the promulgation of rules prescribing allowable funding methods for meeting decommissioning costs. The fact that these regulatory actions may have an economic impact does not mean that they lie outside NRC's jurisdiction.

53 Fed.Reg. at 24037 (citations omitted). NRC's rule amendments permit the appropriate state or federal rate-setting agency to regulate funding for decommissioning; in the case of *wholesale* rate setting, that agency would be FERC. *Id.* at 24037-38.

The Federal Power Act, 16 U.S.C. §§ 824-825, declares that there will be federal regulation "of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," provided this regulation extends "only to those matters which are not subject to regulation by the States." *Id.* at § 824(a). In this case, the decommissioning of an atomic power plant engaged in the wholesale marketing of electricity in interstate commerce is not matter subject to regulation by the state. Thus, by the authority of the Federal Power Act, state regulation must be preempted in this area.

It is undisputed that FERC requires utilities over which it exercises jurisdiction to follow I.R.C. § 468A (1988) which permits deductibility of amounts contributed to the decommissioning trust fund only to the extent such expense is included in rates. Maine Yankee contends that FERC's incorporation of IRC § 468A into the FERC regulatory scheme, as occurred in *Systems Energy Resources, Inc.*, 37 F.E.R.C. 61,261 at p. 61,726-27 (1986) ("SERI") "shows that the IRS regulations are not only a direct federal oversight of decommissioning fund policy, but are also inextricably interwoven into FERC's exercise of its own jurisdiction." The MPUC disputes this contention, claiming that Maine Yankee has failed to show that this incorporation indicates that Congress has granted IRS federal oversight of decommissioning fund policy. In either case, this issue is not determinative as it has already been shown that Congress intended to dominate the field of nuclear safety concerns.

When "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose" as those sought by state regulation, the state regulation is preempted. *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1150 (citation omitted). In enacting the NDFA, the Legislature stated that "timely proper decommissioning of any nuclear power plant . . . is essential to protect public health, safety and the environment." 35-A M.R.S.A. at § 4351. Because Congress has clearly manifested an intent to maintain "complete control over the safety and 'nuclear' aspects of energy generation," the NDFA is preempted.

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. at 212, 103 S.Ct. at 1726.

The entry is:

The February 22, 1990 order is vacated.

All concurring.

AMICUS

BR

CURIAE

RIEF

FILED
FEB 22 1991
OFFICE OF THE CLERK

No. 90-1194

IN THE

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT COURT OF MAINE

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* SUPPORTING PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as amicus curiae in support of the petition for writ of certiorari due to the substantial harm the decision below will have upon the regulation of public utilities

by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioner and Respondent, which have been separately filed with the Clerk.

The NARUC is the national organization which represents the collective interest of the State regulatory utility commissions exercising jurisdiction over natural gas, electric and telephone utilities operating within their respective borders. The NARUC's member commissions, generally called "public service commissions" or "public utility commissions" (PSCs or PUCs), include the Maine Public Utilities Commission (MPUC), Petitioner in this case.

In the decision for which the MPUC seeks this Court's review, the Supreme Judicial Court of Maine (the Maine Court) held that Federal law preempted the authority of the MPUC to establish a decommissioning financing plan for the Maine

Yankee Atomic Power plant, a nuclear generating facility located in Wiscasset, Maine. Specifically, the Maine Court held that the MPUC's authority under Maine law -- the Nuclear Decommissioning Financing Act, 35-A M.R.S.A. secs. 4351-4359 (1988) ("NDFA") -- was preempted by the ratemaking authority of the Federal Energy Regulatory Commission (FERC).[1] By its decision, the Court below held, inter alia, that the MPUC's determination of the costs of Maine Yankee's nuclear decommissioning impermissibly interfered with the authority of the FERC to establish rates for the sale of wholesale power from the plant.

The decision below raises important issues for the State commission members of

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[1] The opinion of the Supreme Judicial Court of Maine (Petitioner's Appendix A) is reported at 581 A.2d 799 (Me. 1990). The unreported decision of the MPUC appears at Petitioner's Appendix B. The text of the NDFA appears at Petitioner's Appendix C. Subsequent reference will be made to these documents, as the appear in Petitioner's Appendix, in this form: App. at ____.

the NARUC. By holding that a State-determined cost of providing electric service is preempted by FERC regulation of wholesale power rates, the Maine Court has cast doubt on the decommissioning plans of other States, as well as other requirements that the States routinely impose on generating facilities located within their respective borders. In so doing, the Court has gone beyond this Court's decisions outlining the boundaries between Federal regulation of the rates for wholesale power sales and the continuing responsibilities of individual States to protect the health and well-being of their citizenry.

Accordingly, this case raises important issues, which should be addressed by this Court, concerning the manner in which State commissions and legislatures deal with electric utility facilities found within their respective borders. As the National representative of the State commissions, the

NARUC's interest in addressing these issues is strong, compelling its participation in this case.[2]

SUMMARY OF ARGUMENT

In reliance on a series of this Court's decisions concerning the relationship of State and Federal supervision of electric utility rates, the Supreme Judicial Court of Maine erroneously held that the MPUC was without jurisdiction under the NDFA to determine the appropriate level of costs for the decommissioning of Maine Yankee -- a nuclear power plant located within the State of Maine. The Court erred by refusing to analyze the MPUC's actions under this Court's holding in Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) ("Pacific Gas & Electric") wherein the Court

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[2] Consistent with this Court's Rule 37.1, the NARUC will not repeat the analysis of preemption doctrine contained in the Petition for Writ of Certiorari. The NARUC supports those arguments.

upheld the authority of the State of California to establish the economic conditions under which nuclear facilities may operate in that State.

One economic condition required by the State of Maine is that Maine Yankee, a nuclear facility located within the State, maintain sufficient funds in its decommissioning reserve accounts to ensure that at the end of the plant's useful life, there will be adequate monies available to fully return the plant site to a safe condition. As the MPUC notes in its petition, at least four other States have enacted statutes to specifically address this situation. Pet. at 8. By striking the MPUC's authority to require that its decommissioning order be obeyed, the Court below calls into question the authority of these States as well.

Additionally, the decision of the Court below threatens other types of costs that

States impose on utilities, such as State and local taxes or wage and labor rules or environmental and siting requirements, which are routinely factored into a utility's cost of service, and accordingly, affect both retail and wholesale power sales rates. Viewed in this light, the fundamental error of the decision below is the Court's confusion of State statutes and regulations which affect the cost of providing utility service, as in the case of the MPUC decommissioning decision, with a series of State commission decisions, struck down by this Court, which sought to prevent retail utilities from passing through wholesale power costs in retail rates.

ARGUMENT

THIS COURT SHOULD REVIEW THE RULING OF THE COURT BELOW THAT STATE REGULATION OF DECOMMISSIONING COSTS IS PREEMPTED BY FEDERAL REGULATION OF WHOLESALE UTILITY RATES

Power plants owned by electric

utilities sell their output to retail consumers and to other utility systems at wholesale. The rates at which wholesale power is marketed are regulated by the FERC under the Federal Power Act as amended, 16 U.S.C. sec. 791 et seq. (1988), even in the case of intrastate wholesale sales. Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964). Many power plants are operated to directly serve retail ratepayers under rates established by State regulators, but some, such as Maine Yankee, provide power exclusively at wholesale, and accordingly, rates for the sale of their output are subject to the jurisdiction of the FERC.[3]

However, even "wholesale" plants must be sited, constructed, operated and, in the case of nuclear facilities, decommissioned, all within the borders of a single State.

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[3] The MPUC does not contest the fact that Maine Yankee's rates are FERC jurisdictional. Pet. at 3

Accordingly, such plants have a presence in a given State which is no different than the presence of a retail generating facility. The plant consumes its fuel, water and air, employs its workers and occupies taxable real property all within the borders of a State whose public officials are vitally concerned that plant operations are conducted in the public interest, broadly defined. To ensure this result, these officials exercise the State's inherent police and taxing authorities to protect its citizenry from the economic and environmental impacts of such facilities.

In its decision in Pacific Gas & Electric, supra, this Court recognized the legitimate need of the States to address the economic aspects of nuclear power production. Despite Congress' enactment of the Atomic Energy Act of 1954, 42 U.S.C. secs. 2011 et seq. (1973), "the States exercise their traditional authority over

the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." 461 U.S. at 212. Indeed, State authority over the economics of nuclear generation includes the power to "allow the development of nuclear power to be slowed or even stopped for economic reasons." 461 U.S. at 223.

Consistent with Pacific Gas & Electric, the State of Maine, through its enactment of the NDFA, has determined not that the development of nuclear power should be slowed or stopped, but rather, that the owners of a nuclear facility located in the State must ensure that adequate funds are available to decommission the plant at the end of its useful life. Were the plant providing power to be sold to retail ratepayers, such a State determination would be unexceptionable, indeed routine.

However, because the plant serves

wholesale consumers, the Court below determined that the MPUC was without jurisdiction to determine the appropriate level of Maine Yankee's decommissioning expenses. Relying on this Court's decisions in Mississippi Power & Light Co. v. Moore, 487 U.S. 354 (1988) and Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986), the Court held, inter alia, that the MPUC's decommissioning order impermissibly interfered with FERC's wholesale ratemaking authority. App. at 9-12.

Both Mississippi and Nantahala involved instances in which States attempted to reallocate or adjust the quantity of wholesale power initially allocated to retail utilities by the FERC.[4] In each

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[4] In Mississippi, the State sought to reduce an FERC-determined allocation among utility retail affiliates of expensive power from the Grand Gulf nuclear facility. 487 U.S. at 373. In Nantahala, the State sought to increase an FERC-determined allocation of low-cost power, also between affiliated utilities. 476 U.S. at 954. In both cases, this Court held that the States lacked

case, the State, either through its regulatory commission or its courts, sought to reduce the rate impact on instate utilities of FERC rulings which determined the relative shares of wholesale power among affiliated utilities operating in more than one State. In response to these State rulings, the Court held that for purposes of determining retail rates of the utilities receiving an allocation of wholesale power, "[o]nce FERC sets such a [wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." Nantahala, 476 U.S. at 966. The sequence of events in these cases, as well as similar State court decisions cited in Nantahala, 476 U.S. at 965, involved efforts of State regulatory bodies to refuse to allow utilities to reflect in retail rates the costs of purchased power

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jurisdiction to "challenge the reasonableness of FERC's allocation." Mississippi, 487 U.S. at 374.

derived from wholesale rates previously determined to be "just and reasonable" by the FERC under the Federal Power Act.

The decision of the MPUC at issue in this case is fundamentally different. Here, in the interest of protecting its citizens from the potential local impacts of a nuclear plant without adequate decommissioning funding, the State commission imposed a cost on Maine Yankee, i.e. the cost of decommissioning the plant, that in turn becomes a component of the wholesale cost of service. Accordingly, the situation here is exactly the converse of the Mississippi/Nantahala fact pattern wherein the FERC-determined wholesale rate becomes a component of retail rates. Far from seeking to regulate the retail rate treatment of a FERC-determined wholesale rate as in Mississippi/Nantahala[5], the MPUC

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[5] See, App. at 48. "We [the MPUC] are not here setting an intrastate rate in conflict with a FERC-approved rate or

has simply established a minimum level of funding which it believes is necessary to ensure that the Maine Yankee site will be safely restored once it stops generating electricity.[6]

In its decision, the Court below failed to understand this distinction between a State decision to deny the passthrough of the costs of a wholesale rate (which may be

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declining to pass through to retail customers a FERC determined interstate rate or cost of service."

[6] Viewed in this light, the MPUC's decommissioning order differs in no material respect from a decision by a State environmental office which required a wholesale generating plant to install pollution control equipment, or reduce waste water discharges. In both cases, the State's directive will increase the plant's costs of providing wholesale power, thereby potentially affecting subsequent FERC rate determinations. The fact that FERC's last wholesale rate order did not factor these costs into rates does not mean that the State is forever foreclosed from imposing them. Yet, that is the apparent result that the decision of the Court below would establish.

preempted[7]) and State decisions which may establish one of the cost factors that FERC uses to determine the rate in the first instance. As evidence of this lack of understanding are the Maine Court's statements which hold that FERC and FERC alone can determine the cost inputs affecting wholesale rate levels. See, App. at 11-12, (". . . FERC's exclusive jurisdiction applies not only to rates, but to the components that affect rates.") Clearly, the FERC has jurisdiction under the Federal Power Act to determine the manner in which costs are reflected in wholesale

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[7] In dicta, the Court in Mississippi recognized that there may well be circumstances in which a State may have jurisdiction to affect a retail utility's passthrough of a wholesale rate. ". . . it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even if it had the legal right to refuse to buy that power." 487 at 373-4. There is no suggestion in the decision of the Court below that Maine Yankee is legally precluded from complying with the MPUC decommissioning order by the prior FERC ratemaking decision.

rates, but the costs themselves -- be they for labor, fuel, environmental compliance, or plant decommissioning -- are subject to a host of market and governmental forces far beyond the capability of FERC or any other commission to regulate. Therefore, the Maine Court's conclusion that FERC has jurisdiction to regulate cost inputs, both legally and practically, is error.

The Maine Court's confusion is no more apparent than in its discussion of FERC decisions which allocate shares of wholesale power costs among retail utilities. App. at 11. In Mississippi, this Court reasoned that FERC allocation decisions had the same preemptive effect as decisions actually setting a wholesale rate. 487 U.S. at 371. The preemptive effect of this holding, however, is to create retail costs which, under Mississippi, "are binding on the States." Id. But there is no suggestion in Mississippi or Nantahala that every State or

local government decision which may "affect" the wholesale costs of providing service is subject to FERC preemption.

Yet, that reading of Mississippi is the only logical result of the Maine Court's analysis. Because of its inability to distinguish wholesale costs from wholesale rates, that Court's holding expands the Mississippi/Nantahala line of cases far beyond the contours established by this Court. If followed in other jurisdictions, and applied to other types of State-determined "wholesale costs", the decision of the Court below will gravely restrict the ability of the States to ensure that the interest of the public is protected from the impacts of utility facilities.

Therefore, this Court should review the decision of the Maine Court to correct its flawed reading of the contours of State and Federal power in this regulatory arena. The MPUC's Petition should be granted.

CONCLUSION

The NARUC respectfully requests that the Petition for Certiorari be granted.

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Supreme Court, U.S.
FILED
MAR 5 1991
OFFICE OF THE CLERK

No. 90-1194

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 5, 1991

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its Brief in Opposition, Maine Yankee Atomic Power Company ("Maine Yankee") raises what appears to be two new issues. Both are merely exercises in circular logic designed to divert attention away from the important issue presented by the Maine Public Utilities Commission ("MPUC") petition.

First, Maine Yankee argues that the petition by the MPUC is a collateral attack upon a FERC rate order. This assertion assumes that decommissioning expenses are rates and not costs reflected in rates. That, of course, is the very issue before this Court. If decommissioning expenses are costs, then they may change without FERC approval and the fact that they change is not a collateral attack upon any rate order. State action may cause labor costs to increase, state taxes to increase, insurance costs or environmental regulation compliance costs to increase; however, none of these can be considered a collateral attack on a FERC order.

The MPUC *is* attacking a federal constitutional ruling by the Maine Supreme Court that decommissioning expenses are rates and not costs and that, therefore, the State is preempted from setting decommissioning funding levels. Should this Court overturn that constitutional determination, it would have no effect on existing FERC rates or past rate orders. The MPUC would expect, however, that future rate orders would take into account any change in Maine Yankee's decommissioning costs.

Maine Yankee alleges that the MPUC "question[s] the jurisdiction of FERC to fix Maine Yankee's decommissioning funding levels and the validity of FERC's classification of decommissioning expenses as a stated rate." *Brief in Opposition* at 25. As noted above, the MPUC fully expects future FERC rate orders to "fix" the amount and treatment of decommissioning costs reflected in the rates. That is FERC's job and the MPUC does not question its authority to do it. As a cost of doing business, decommissioning funding levels will continue to be reflected in rates as the FERC deems proper, just as every other cost from State taxes to nuclear fuel is reflected.

Nor does the State challenge FERC's authority to classify such costs in any manner it pleases, putting them into formula or stated rate categories for the purposes of rate regulation and administration. The MPUC *does* challenge the ruling of the Maine Supreme Court that such classification has any bearing upon the State's authority to impose those costs. Under the Maine Court's reasoning, the State would lose its ability to tax without FERC approval if FERC were to declare State taxes part of a stated rather than formula rate. It is that reasoning which the MPUC challenges, not FERC's authority to classify costs. There is no collateral attack upon any FERC order involved in this appeal.

Maine Yankee also asserts that the Maine Court's recitation of one of the preamble provisions to the NDFA (35-A M.R.S.A. § 4351) mentioning that proper decommissioning is essential to protect public health, safety and the environment, constitutes a "finding" by the Maine Court that the State Law in question is health and safety regulation, and that that finding is binding upon this

Court. First, it is not clear that the Maine Court made any such "finding." The Maine Court clearly found the NDFA preempted by the FERC's determination of decommissioning costs, and yet the FERC has no more authority to regulate the health and safety of nuclear power than do the States. Second, even if the Maine Court had made such a finding, that "finding" would be a constitutional determination that decommissioning funding is "safety" regulation delegated by Congress to the federal government. The Maine Court's decision is not a matter of state statutory interpretation to which this Court must pay deference but a matter of federal constitutional interpretation which is clearly at odds with this Court's ruling in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190 (1983). The Maine Court's constitutional determination is erroneous and should be corrected by this Court.

Both arguments by Maine Yankee attempt to obscure the simple, straightforward and important question presented in MPUC's petition: has Congress intended that ratemaking agencies have exclusive jurisdiction to set site-specific decommissioning funding requirements?

The principle at issue before the Court today is one of broad and general applicability which, when established, will clearly define the respective authority of every regulatory agency, both state and federal, with regard to the financial planning for the decommissioning of every nuclear power facility in this nation. The principle that the state within which a nuclear plant is located should have the authority to financially plan for the decommissioning of that facility in conformance with Nuclear Regulatory Commission (NRC) rules is unambiguously and

equally applicable to every such nuclear facility operating now or to be constructed in the future. It is a principle that applies sound constitutional reasoning to establish uniformity and logic in an area which now is fragmented by the accidental distinctions of corporate organization and historic whimsy, distinctions that scatter authority among various jurisdictions in a manner which bears no rational relation to the problems presented or the interests meant to be protected by the decommissioning process. The NRC rules and regulations do not differ depending upon whether the facility in question sells at wholesale or retail. There is no physical difference between waste generated for wholesale or retail production. The interests of the States in proper decommissioning is indifferent to such a distinction. There is no rational or constitutional reason why state authority should hinge on such a distinction.

CONCLUSION

For the reasons stated herein and in the Petition For A Writ Of Certiorari, certiorari should be granted in this case.

Respectfully submitted,

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FILED
MAY 31 1991
OFFICE OF THE CLERK

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No. 90-1194

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAINE PUBLIC UTILITIES COMMISSION, PETITIONER

v.

MAINE YANKEE ATOMIC POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

A Maine statute, the Nuclear Decommissioning Financing Act, Me. Rev. Stat. Ann. tit. 35-A, §§ 4351-4359 (1988), requires an electric utility to establish a trust fund, and to obtain state approval of a plan for accumulating adequate reserves in that fund, to finance the decommissioning of a nuclear generating plant located in that state. The question presented is whether an order issued by petitioner under authority of that statute is preempted by the Atomic Energy Act or the Federal Power Act, or conflicts with an order of the Federal Energy Regulatory Commission issued under the latter Act.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Respondent Maine Yankee Atomic Power Company owns and operates a nuclear electric generating unit in Wiscasset, Maine, under an operating license from the Nuclear Regulatory Commission. Maine Yankee is owned by ten "sponsors," investor-owned electric utilities located in Maine, New Hampshire, Vermont, Massachusetts, and Connecticut. The sponsors purchase, for resale, all of the electricity produced by Maine Yankee's Wiscasset nuclear unit. Pet. App. 2. The Maine Supreme Judicial Court held

that an order of petitioner Maine Public Utilities Commission obligating Maine Yankee to set aside specified sums to finance the plant's decommissioning costs, and the statute on which the order was based, are preempted by the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, and Title II of the Federal Power Act, 16 U.S.C. 824 *et seq.*

1.a. Under the AEA, the Nuclear Regulatory Commission has exclusive authority to regulate the radiological health and safety aspects of nuclear generating plants. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205-212 (1983). See *English* v. *General Elec. Co.*, 110 S.Ct. 2270, 2276-2278 (1990). Exercising this authority, the NRC has promulgated technical and financial requirements for "decommissioning" licensed nuclear facilities. 53 Fed. Reg. 24,018 (1988). A nuclear facility is decommissioned at the end of its useful life "to remove [it] safely from service" and "to reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license." 10 C.F.R. 50.2. The NRC's regulations prescribe the methods through which nuclear plants are to be decommissioned, establish minimum funding levels for decommissioning, and require each licensee to create a separate decommissioning fund and formulate a decommissioning financing plan. See 53 Fed. Reg. 24,019-24,056 (1988).

The NRC's minimum funding requirements, like its other decommissioning regulations, have "the narrow focus of protecting public health and safety." 53 Fed. Reg. 24,038 (1988). Because other concerns are also potentially relevant to decommissioning financing, the NRC's regulations note that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies (*e.g.*, Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation." 10 C.F.R. 50.75(a). In particular, the NRC's regula-

tions do not "deal with financial ratemaking issues such as rate of fund collection, procedures for fund collection, cost to ratepayers, taxation effects, equitability between early and later ratepayers, accounting procedures, ratepayer versus stockholder considerations, responsiveness to change and other similar concerns." 53 Fed. Reg. 24,038 (1988).

b. FERC has exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). A utility must file with FERC "schedules showing all rates and charges for any * * * sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges." 16 U.S.C. 824d(c). In the event of a dispute over the rate charged by a utility in a transaction subject to FERC's jurisdiction, FERC is empowered to determine whether the rate (or the classifications, practices, regulations, or agreements on which the rate is based) are reasonable and, if they are not, to substitute reasonable terms. 16 U.S.C. 824e(a). Section 272 of the AEA, 42 U.S.C. 2019, specifically recognizes FERC's authority over wholesale sales of electric power generated at nuclear facilities. 42 U.S.C. 2019. Because Maine Yankee sells all of its power at wholesale, FERC has exclusive jurisdiction over the rates and terms at which that utility sells its power.

Reserves for decommissioning costs of nuclear facilities have traditionally been treated by FERC, in conjunction with depreciation expense, as a cost of service to be recovered from ratepayers. *Indiana & Michigan Municipal Distributors Ass'n* v. *Indiana Michigan Power Co.*, 49 F.E.R.C. ¶ 63,020, at 65,084 (1989). In order to assure that the costs of decommissioning nuclear facilities are equitably borne by those who receive the power, the Commission has determined that "[t]he same ratepayers bearing a deprecia-

tion charge for nuclear plant also should bear a decommissioning charge applicable to that plant." *Ibid.* See *Boston Edison Co.*, 34 F.E.R.C. ¶ 63,023, at 65,076 (1986) (recovery of decommissioning costs should "be spread equitably over today's and tomorrow's consumers").

2. In accordance with NRC regulations, Maine Yankee has established a decommissioning fund and has made regular payments into it. Since 1981, the utility's contributions to the decommissioning fund have been set forth in wholesale rate tariffs Maine Yankee has filed with FERC. Petitioner requested this treatment of Maine Yankee's funding costs, *Maine Yankee Atomic Power Co.*, 17 F.E.R.C. ¶ 61,208, at 61,399-61,400 (1981), in order to assure Maine Yankee's contributions to its decommissioning fund could not be changed without FERC's advance approval. A series of FERC orders have given effect to tariffs specifying the payments that Maine Yankee would make into its decommissioning fund. Pet. App. 3-4.[1]

In 1988, Maine Yankee petitioned FERC for an order allowing it to pay $14,466,467 per year for ten years into its decommissioning fund, in order to accumulate a total of $178,097,900 (in 1987 dollars). After petitioner intervened in the proceeding, FERC rejected Maine Yankee's accelerated funding schedule and required the company to "file revised rates, reflecting recovery of decommissioning costs over the nuclear unit's remaining life." Pet. App. 5. Thereafter, Maine Yankee filed a settlement agreement with

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[1] See, *e.g.*, *Maine Yankee Atomic Power Co.*, 17 F.E.R.C. ¶ 61,208 (1981); *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶ 61,141 (1982); *Maine Yankee Atomic Power Co.*, 31 F.E.R.C. ¶ 61,068 (1985); *Maine Yankee Atomic Power Co.*, 42 F.E.R.C. ¶ 61,307 (1988); *Maine Yankee Atomic Power Co.*, 43 F.E.R.C. ¶ 61,453 (1988); *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶ 61,368 (1988).

FERC that fixed decommissioning costs at $167,000,000 (in 1987 dollars); provided for 20 annual payments of $9,073,943 to the decommissioning fund; and prescribed a return of 12.9% on equity. In addition, the settlement contained a "stay-out" provision prohibiting Maine Yankee, until February 1991, from seeking a rate increase to finance higher contributions to the decommissioning fund. Neither petitioner nor any other party to the proceeding objected to the settlement or sought judicial review of FERC's order approving it. *Id.* at 5-6, 20.

3. Since 1982, Maine Yankee has also been involved in proceedings under Maine's Nuclear Decommissioning Financing Act (NDFA), Me. Rev. Stat. Ann. tit. 35-A, §§ 4351-4359 (1988) (Pet. App. 94-117). That statute requires, *inter alia*, that a licensee operating a nuclear power plant in Maine submit a proposed decommissioning financing plan to petitioner for review and approval. In 1982, Maine Yankee filed a proposed plan with petitioner. Petitioner ruled that the filing was incomplete, but granted Maine Yankee's request for additional time to supplement the plan. Petitioner approved an interim financing plan in 1983, but has not yet approved a final financing plan. Pet. App. 4-5.

In March 1989, Maine Yankee filed a motion with petitioner in which it sought to incorporate the terms of the FERC-approved settlement in its interim financing plan and to obtain final approval of the plan. Pet. App. 6. Petitioner set a hearing on the motion. In advance of the hearing, Maine Yankee sought a ruling that petitioner was preempted by federal law from ordering any changes to the schedule of payments prescribed by the FERC order for Maine Yankee's decommissioning fund. *Id.* at 21.

In the order at issue in this case, petitioner ruled that it was not required to observe the terms of the FERC-approved settlement. Pet. App. 25-54. Petitioner further

concluded that the settlement provided an inadequate sum for decommissioning, and it ordered Maine Yankee, beginning on March 1, 1990, to make payments to the decommissioning trust fund greater than the amounts stated in Maine Yankee's FERC rate schedule. *Id.* at 90-91. Specifically, petitioner determined that the reasonable cost of decommissioning Maine Yankee's atomic unit would be $178,097,900 (in 1987 dollars); an annual payment of approximately $9,793,904 is required to produce that sum. *Id.* at 81, 91.

Maine Yankee sought reconsideration of the order, arguing that it could not amend its rates to collect the increased amount required by the state order without FERC's approval and that the "stay out" provision of the settlement agreement approved by FERC prohibited it from seeking such an increase. Petitioner responded that its earlier order was not intended to require Maine Yankee to collect the increased amount from its customers, "because a change in amount from customers must be made by FERC." Br. in Opp. App. 43. Rather, petitioner continued, "[t]he additional amount we ordered into the Trust Fund must come from Maine Yankee, essentially from shareholders or sponsors, until such time as the FERC allows these costs to be collected in rates." *Ibid.*

4. Maine Yankee sought judicial review.[2] The Maine Supreme Judicial Court vacated petitioner's order, finding that the NDFA and petitioner's order are preempted by federal law. Pet. App. 1-15. The court set forth two alternative grounds for that determination.

a. First, finding that it was impossible for Maine Yankee to comply both with the 1988 FERC order approving the funding arrangement prescribed by the company's settlement agreement and with petitioner's order, the court held that "[petitioner's] order and the NDFA interfere imper-

[2] Petitioner stayed its order pending appeal. Pet. App. 44-45.

missibly with FERC's exclusive jurisdiction over wholesale rates." Pet. App. 12. The court explained that FERC's order required that decommissioning expense be "collected from ratepayers as a cost of service" and prohibited a request for a rate increase prior to February 1991, thereby "prevent[ing] [Maine Yankee] from raising the revenues necessary to meet the demands of [petitioner's] order." *Id.* at 10. Since FERC had fixed the rate of return on equity at 12.9%, the court continued, petitioner's direction that additional funding for decommissioning come from the assets of Maine Yankee and its sponsors "impermissibly mandated a reduction in the sponsors' rate of return and weaken[ed] the company's financial base." *Ibid.*

The court rejected petitioner's contention that its order did not interfere with FERC's ratemaking because the order affected Maine Yankee's rates only indirectly. Pet. App. 11-12. The court explained that under *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), "FERC's exclusive jurisdiction applies not only to rates, but to the components that affect wholesale rates." Pet. App. 11. This principle applies to Maine Yankee's decommissioning financing plan, the court concluded, since that plan "directly affect[s] the calculation of reasonable wholesale rates over which FERC exercises exclusive jurisdiction." *Id.* at 11-12.

b. The court also held that the order and the statute impermissibly intrude on a field that is pervasively regulated by federal law. Pet. App. 12-15. The state court noted that this Court's decision in *Pacific Gas & Electric* establishes, as petitioner conceded, that "state regulation of nuclear power is preempted when its purpose is to regulate safety, even when it does not directly conflict with federal law." Pet. App. 13. "In enacting the NDFA," the court found, "the [Maine] Legislature stated that 'timely proper decom-

missioning of any nuclear power plant . . . is essential to protect public health, safety and the environment.'" *Id.* at 15 (quoting Me. Rev. Stat. Ann. tit. 35-A, § 4351 (1988)). The court held, accordingly, that "[b]ecause Congress has clearly manifested an intent to maintain complete control over the safety and nuclear aspects of energy generation, the NDFA is preempted." Pet. App. 15 (internal quotation marks omitted).

In reaching this conclusion, the court noted that the NRC's regulations "permit the appropriate state or federal ratesetting agency to regulate funding for decommissioning." Pet. App. 14. But it held that "in the case of *wholesale* rate setting, that agency would be FERC." *Ibid.* In view of the Federal Power Act's application to wholesale sales of power, the court continued, "the decommissioning of an atomic power plant engaged in the wholesale marketing of electricity in interstate commerce is not a matter subject to regulation by the state," and "state regulation must be preempted in this area." *Ibid.*[3]

DISCUSSION

The Supreme Judicial Court's decision is clearly correct on either of two alternative grounds. First, that court determined, relying on the language of the statute, that the purpose of the NDFA is "to protect public health, safety and the environment." Pet. App. 15. This determination of the state statute's purpose, by Maine's highest court, compels the conclusion that the statute is preempted by the Atomic Energy Act. Second, petitioner's order conflicts with a FERC order, within the scope of FERC's exclusive jurisdic-

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[3] The Court found it unnecessary to determine whether Section 468A of the Internal Revenue Code, 26 U.S.C. 468A, a provision governing the deductibility of contributions to a decommissioning trust fund, also preempts applicable state law. Pet. App. 14-15.

tion under the Federal Power Act, establishing the amount of Maine Yankee's annual contribution to its decommissioning fund. In our view, FERC properly exercised its jurisdiction in issuing that order, and, in any event, the validity of FERC's order is subject to challenge only in a direct appeal to a federal court of appeals. Because it is impossible for Maine Yankee to comply with both FERC's order and petitioner's order, petitioner's order cannot stand.

Because the state court's judgment may be sustained on these grounds, it is unnecessary, and would be inappropriate, for this Court to consider in this case the broader question whether the AEA and the FPA leave any room for state regulation of the decommissioning of nuclear facilities producing power subject to FERC's jurisdiction. Indeed, this is apparently the first case to address a state statute operating in that field.

1. In *Pacific Gas & Electric*, 461 U.S. at 205-206, 211-212, this Court established the fundamental division of regulatory authority over nuclear power plants. "[T]he Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like"; and FERC enjoys "broad authority * * * over the need for and pricing of electric power transmitted in interstate commerce."

Under this scheme, any effort at state regulation of the nuclear health and safety aspects of a nuclear power plant is preempted. "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the

States." 461 U.S. at 212.[4] Thus, a state law improperly infringes upon the area preempted by the Atomic Energy Act if its purpose is to regulate nuclear safety or it has "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English* v. *General Elec. Co.*, 110 S. Ct. at 2276-2278.

In *Pacific Gas & Electric*, the Court addressed a California statute that conditioned the construction of nuclear plants on a finding by a state agency that adequate facilities were available to dispose of resulting nuclear waste. Although "[t]here are both safety and economic aspects to the nuclear waste issue," 461 U.S. at 196, the State argued, and the court of appeals found, that the state statute was "aimed at economic problems, not radiation hazards," *id.* at 213. This Court upheld that finding. *Id.* at 216. In this case, by contrast, the Supreme Judicial Court reached the opposite conclusion. The court determined that the object of the NDFA was "to protect public health, safety and the environment." Pet. App. 15. This construction of state law by Maine's highest court is controlling,[5] and, as the court recognized, it is fatal to the NDFA and hence to petitioner's order issued thereunder.

2. Although petitioner fails to come to terms with the Supreme Judicial Court's determination of the NDFA's

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[4] Thus, petitioner's contention (Pet. 18) that the NDFA "does not conflict with NRC safety regulations" is immaterial. The Atomic Energy Act preempts even state regulation that seeks, on grounds of safety, to supplement the NRC's regulatory regime.

Petitioner does not suggest that the NDFA may be sustained as an exercise of authority ceded by the AEA to the State of Maine. See 461 U.S. at 208-209, 212-213 n.25.

[5] See, *e.g.*, *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837 n.9 (1978); *Brown* v. *Ohio*, 432 U.S. 161, 167 (1977); *Gurley* v. *Rhoden*, 421 U.S. 200, 208 (1975); *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974).

purpose, it also argues that the state order at issue may be sustained as "economic regulation of decommissioning funding" (Pet. 5). We disagree. In our view, regardless of the purpose of the order or of the statute under which it was issued, the order is preempted because it conflicts with a valid order issued by FERC within its area of exclusive jurisdiction under the Federal Power Act.

The NRC's regulations recognize that the decommissioning of nuclear facilities involves concerns other than nuclear safety. Accordingly, the regulations state that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies * * * having jurisdiction over ratemaking." 10 C.F.R. 50.75. That regulation may address such matters as "rate of fund collection, procedures for fund collection, cost to ratepayers, taxation effects, equitability between early and later ratepayers, accounting procedures, ratepayer versus stockholder considerations, responsiveness to change and other similar concerns." 53 Fed. Reg. 24,038 (1988).[6]

Maine Yankee sells all of its power at wholesale. Thus, as petitioner concedes (Pet. 3), FERC has exclusive jurisdiction to address these considerations in the course of overseeing Maine Yankee's rates. See *Mississippi Power*, 487 U.S. at 371, 374; *Nantahala*, 476 U.S. at 966. See also *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964). Petitioner contends, nevertheless, that the NDFA order does not interfere with FERC's exercise of this

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[6] Petitioner seriously mischaracterizes this NRC regulation when it suggests that "the NRC has delegated its exclusive jurisdiction over safety matters in the sphere of decommissioning funding to ratemaking agencies." Pet. 16. The NRC has delegated none of its responsibility for the safety aspects of nuclear power. Rather, it has simply recognized that regulation that is based on grounds other than safety and is consistent with NRC's safety-oriented requirements may subsist with the NRC regulatory scheme.

authority. It reasons that the NDFA does not restrict ratemaking as such, but instead imposes costs of doing business that FERC, as a ratemaker, must take as a given. Pet. 12-14. We submit that this Court's decisions foreclose petitioner's narrow view of the matters subject to FERC's exclusive jurisdiction, and that the square conflict between petitioner's order and FERC's order compels the conclusion that the former is preempted in any event.

a. This Court has made clear that FERC's exclusive jurisdiction "is not limited to 'rates' *per se*; '[the] inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases.'" *Nantahala*, 476 U.S. at 966. For instance, in *Mississippi Power* and *Nantahala*, the Court held that "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates." 487 U.S. at 371. See 476 U.S. at 966-967. Likewise, in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), the Court held that a state statute requiring gas pipeline companies to obtain approval from the State's utilities commission for the issuance of securities infringed upon FERC's exclusive jurisdiction under the Natural Gas Act.[7] Although the Court noted that FERC "is not expressly authorized to regulate the issuance of securities by natural gas companies," *id.* at 304, the Court found that FERC's exercise of its authority entailed substantial oversight of the capital structure of those firms, *id.* at 301-304. After examining the purposes of the state statute, the Court concluded that "when applied to natural gas companies, [that statute] amounts to a regulation of rates and facilities, a field occupied by federal regulation." *Id.* at 307. That

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[7] This Court has noted that the Natural Gas Act and the Federal Power Act draw substantially the same line between state and federal authority. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

conclusion was bolstered, the Court added, by "the imminent possibility of collision" between the state statute and FERC's regulation of interstate sales of gas; the state statute created the possibility that state authorities would disapprove securities transactions underlying FERC's ratemaking determinations. *Id.* at 310.

The principles applied in *Mississippi Power*, *Nantahala*, and *Schneidewind* compel the conclusion that petitioner's order is preempted. Maine Yankee has filed tariffs with FERC that have identified decommissioning costs as an element of costs to be recovered from its customers. In authorizing the utility's filed rates, FERC has addressed the size of the decommissioning fund required to retire the Wiscasset facility at the end of its useful life and the payments necessary to generate that fund. Unless FERC was acting outside its jurisdiction under the Federal Power Act, any conflicting determinations on these questions, issued under authority of state law, are necessarily preempted. See, *e.g.*, *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, 489 U.S. 493, 515-516 (1989).

b. There are two reasons why FERC's jurisdiction to fix Maine Yankee's payments to its decommissioning fund may not be questioned in this case.

First, like the power allocations at issue in *Mississippi Power* and *Nantahala* and capital structure determinations alluded to in *Schneidewind*, the magnitude of Maine Yankee's contributions to its decommissioning fund are integral to the rates the utility may charge its customers. Maine Yankee's rates are directly dependent upon the amounts it must set aside to finance the decommissioning of its plant. As noted, FERC's established practice is to fix the costs of decommissioning a nuclear plant in setting wholesale rates. It is true that safety concerns and escalating costs in the nuclear industry give particular urgency to those determina-

tions. Nevertheless, the NRC is exclusively responsible for setting the standards necessary to assure the safe decommissioning of nuclear reactors, and FERC's responsibility for overseeing the financial operations of utilities that sell power at wholesale in interstate commerce is not nullified by the difficulties associated with retiring nuclear facilities.[8]

Second, to the extent that there may be a basis for dispute as to FERC's authority to fix Maine Yankee's decommissioning payments, the only proper avenue for resolving that dispute would have been an appeal from FERC's order approving Maine Yankee's rates. Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), provides a "specific, complete and exclusive mode for judicial review" of FERC's orders. *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). See *Oklahoma Natural Gas Co.* v. *Williams Natural Gas Co.*, 890 F.2d 255 (10th Cir. 1989), cert. denied, 110 S.Ct. 3236 (1990). Under the filed rate doctrine, FERC's determinations regarding wholesale rates and matters underlying them are binding—subject only to direct review—on private parties, state authorities, and state and federal courts. *Mississippi Power & Light*, 487 U.S. at 371-372; *Nantahala*, 476 U.S. at 963-964. Here, although petitioner was a party to the proceeding in which FERC approved Maine Yankee's rates and had an opportunity to object to FERC's jurisdiction over decommissioning financing and the terms prescribed by the utility's filed rates, 18 C.F.R.

[8] Contributions to Maine Yankee's decommissioning fund are not, as petitioner and its amicus suggest (Pet. 14), analogous to taxes. Maine's legislature did not impose a generally applicable charge on utilities payable to the State. Rather, it authorized the State's public utilities commission to calculate the size of a financial reserve, funded by a utility for the sole purpose of retiring that utility's physical plant, and to set the payments required to accumulate that reserve. That task is indistinguishable from the financial determinations Congress authorized FERC to make in setting rates for utilities that sell power in interstate transactions subject to its jurisdiction.

385.602, it did not do so. Nor did petitioner seek judicial review. Petitioner does not have authority, in a proceeding under the NDFA, to determine that FERC's order was beyond the scope of its authority under the Federal Power Act; *a fortiori*, petitioner may not disregard that order in reaching a conflicting determination on the very issues FERC has resolved.

c. The Supreme Judicial Court's determination (Pet. App. 10) that "it is impossible for Maine Yankee to comply with both" FERC's order and petitioner's order is not subject to serious dispute. The settlement agreement approved by FERC fixes Maine Yankee's annual contribution to its decommissioning fund at $9,~~793,964~~ 073,943. The rates paid by the purchasers of its power are calculated to cover this sum and the utility's other costs while providing a given rate of return on equity, and the utility was prohibited from seeking a rate increase to cover any greater contribution prior to February 1991. Petitioner's order purported to require Maine Yankee to make higher payments to its decommissioning fund during the period it was unable to obtain a rate increase. Compliance with this order would necessarily undercut the rate of return on equity FERC had determined was appropriate.

Under *Mississippi Power* and *Nantahala*, this conflict between petitioner's and FERC's orders must be resolved in favor of the latter. Thus, even if the Supreme Judicial Court was mistaken in its determination that the NDFA's purpose is to regulate nuclear safety, petitioner's order is nevertheless preempted.[9]

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[9] We do not suggest, of course, that state regulation is preempted only when it is in conflict with a FERC order. Because the Federal Power Act preempts the field in which FERC exercises jurisdiction, see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. at 300 (1988); *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. at 509, "the preemptive effect of FERC jurisdiction" does not turn on "whether

3. Petitioner and its amicus suggest that further review is warranted to determine the extent to which States may regulate the decommissioning of nuclear plants selling power at wholesale. Pet. 5-9. It is true that "every state statute that has some indirect effect on rates and facilities" subject to FERC's jurisdiction "is not preempted." *Schneidewind*, 485 U.S. at 308-309. See *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, *supra*. This case does not, however, call for a determination whether States retain *any* authority to address the decommissioning of nuclear plants selling power at wholesale in interstate transactions. Whatever the answer to that question may be, the grounds discussed above are sufficient to invalidate petitioner's order.

There are other reasons not to consider that general question in this case. This is apparently the first case to address the relationship between FERC's authority under the Federal Power Act and a state statute such as the NDFA. Maine Yankee is unusual in that it sells all of its power in wholesale transactions; we are advised that only five nuclear plants sell their entire output at wholesale. For all these reasons, further review by this Court is not warranted.

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a particular matter was actually determined in the FERC proceedings," *Mississippi Power*, 487 U.S. at 374. See generally *FPC* v. *Southern California Edison Co.*, 376 U.S. at 215-216.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20572

FILED
JUN 10 1991
OFFICE OF THE CLERK

No. 90-1194

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

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PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES

The brief of the United States demonstrates that it is a simple matter to arrive at a conclusion if one first assumes it as a premise. That proof, however, is unremarkable and leaves unanswered the question that is properly before this court: did Congress intend that the Federal Energy Regulatory Commission (FERC), by virtue of its jurisdiction over wholesale rates, should preempt state authority in deciding how much and when money must be set aside in a trust fund for the decommissioning of a nuclear power plant located on that state's own soil.

As to the first argument offered by the Solicitor General, a holding by the Maine Court that the Nuclear Decommissioning Financing Act (NDFA) is health and safety regulation and therefore preempted by Nuclear Regulatory Commission (NRC) regulation would be an interpretation of Constitutional law that decommissioning financing is health and safety regulation over which the Federal Government has exclusive jurisdiction. Not only is any such holding incorrect, since several states already regulate decommissioning financing, but it is also one of the Constitutional points at issue in this proceeding. This Court owes no deference to the Maine Court on the interpretation of Constitutional law. The Solicitor's argument assumes that the finding of Federal preemption can be made without reaching Constitutional issues thereby foreclosing this Court's review. Such an argument is wrong.

It is clear that the matter before the Court involves economic regulation; indeed, that is why the United

States contends that MPUC violated FERC orders and not Nuclear Regulatory Commission orders. In making its second argument, however, the United States simply assumes that economic regulation and ratemaking are synonymous. Specifically, it assumes that FERC's authority to reflect decommissioning funding costs in rates is synonymous with the authority to dictate what those costs will be. Yet the two powers are clearly non synonymous. If they were, FERC would have the authority to dictate State and Federal taxes or labor costs since these are also reflected in rates. Congress clearly cannot have intended to grant FERC authority to dictate costs simply by virtue of its ratemaking authority. Such an assumption is both illogical and insupportable by any reasoned analysis of the Federal Power Act (FPA), 16 U.S.C. §§ 791-828(c) (1988), or this Court's precedents. The Solicitor General's analysis on this point amounts to nothing more than this assumption and is not very helpful to deciding this case. The Solicitor's brief contains no discussion of Congressional intent to invest the FERC with such extra-ratemaking preemptive authority and no analysis of the FPA or any other Legislative act that confers upon FERC this extraordinary authority in the particular case of decommissioning costs. Yet without this assumption, the Solicitor's "analysis" simply melts away.

If Congress has not granted FERC authority to dictate these costs, then the fact that they appear, like any other cost, in FERC rate tariffs is immaterial to the State's authority and the principles established in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 153 (1986), and *Schneidewind v. ANR Pipeline Co.*, 485 U.S.

293 (1988), have no more bearing than they would in the case of taxes or labor costs.

If FERC has not been granted authority by Congress to dictate these costs, then the fact that these costs, like any other cost that must be recovered by the utility, "are integral to the rates the utility may charge its customers," (brief of the United States, page 13) is irrelevant. The fact that "Maine Yankee's rates are directly dependent upon" (*Id.*) its costs is not an argument for Federal preemption.

If FERC has not been granted authority by Congress to dictate these costs, then the State does not need to challenge FERC rate orders in order to impose them. There is no constitutionally relevant "conflict" with FERC rate orders every time the costs of producing electricity change. The utility simply files for new rates to reflect its new costs[1]; no one "appeals" the old rate order.

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[1] The MPUC offers no opinion as to the propriety of FERC's 1988 "stay out" provision. Reexamination by FERC of the appropriateness of that order in light of Maine Yankee's changing costs may be warranted. But it is clear that a procedural "stay out" provision cannot preempt the State from imposing legitimate costs. The Constitutional limits of State authority to regulate decommissioning funding are not matters to be resolved by FERC procedural orders in individual rate case determinations. It is the intention of Congress that controls the preemptive effect of FERC rate orders. If the "stay out" provision works unreasonable hardship upon Maine Yankee, that is a matter for Maine Yankee to address at FERC, but the State's authority is not thereby implicated.

Preemptive authority cannot arise simply because decommissioning costs were reflected in rates by FERC before Maine acted to establish funding requirements, although this illogical conclusion is implicit in the Solicitor General's argument. The fact that FERC required ratepayers' payments to be isolated and put in trust did not convert the decision of how much and when funds must be paid into such a trust fund to a ratemaking function. There are logical reasons that the FERC required electric utilities to put the funds provided by ratepayers for decommissioning costs into an external trust fund, as the NRC now requires the nuclear plant owner to do, regardless of whether the owner receives the money from ratepayers. Maine law, also consistent with the same NRC regulations, now requires the trust funds to protect taxpayers and Maine citizens generally from the possible financial consequences of inadequate funding by a nuclear plant operator in Maine. The State of Maine is not preempted from imposing decommissioning funding costs because external funding was already required by FERC. The Maine Law leaves the decision of whether those costs should be reflected in rates, and the timing of when any such costs should be in rates to those agencies having ratemaking jurisdiction.

Finally, the Solicitor claims that "[t]he Supreme Judicial Court's determination that 'it is impossible for Maine Yankee to comply with both' FERC's Order and Petitioner's Order is not subject to serious dispute". (brief of the United States, page 15.) This may be true only in the sense that one does not "seriously dispute" assertions which are patently illogical. If Congress has not granted FERC authority to dictate decommissioning costs, then

the problem is one of regulatory lag not Federal preemption. Regulatory lag is not a matter of Constitutional concern unless so extreme as to verge upon a taking, and, even if found, the solution is not Federal preemption of cost escalation, but procedural acceleration. Costs in the electric industry routinely change at a pace that is one step (often several steps) ahead of the regulatory process. Changes in cost often affect the utility's return on equity until the next rate proceeding. Yet rate orders do not preempt cost escalation; neither does inflation generate "Constitutional conflict" with old rate determinations.

It is the intent of Congress in passing the FPA which determines the preemptive effect of FERC orders upon State legislation. FERC cannot expand the scope of its preemptive authority by means of its own regulations. The FPA does not contain any explicit grant of authority over decommissioning financing. Notably absent from the Solicitor General's analysis, however, is any consideration of Congressional intent as to the limits of FERC authority under the FPA. Yet in the debates surrounding its original passage, the issue of the limitation of Federal encroachment upon traditional State authority received much attention.

As indicated by the Senate Report on the final version of the bill that authorized the Federal regulation of wholesale electricity transactions, there was, in fact, a concerted effort made to limit the intrusion of Federal Power Commission (now FERC) authority into matters which could be effectively handled by State regulation.

> The revision has also removed every encroachment upon the authority of the States.

> The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters.

Public Utility Act of 1935, S. Rep. No. 621, 74th Cong. 1st Sess. 18 (1935).

The State is competent to regulate financial planning for decommissioning in accordance with NRC regulations. Given such competence, there is no statutory support for the proposition that Congress intended FERC to preempt the State in this area.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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